(25,790)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 960.

WILLIAM W. WITHNELL, PLAINTIFF IN ERROR,

vs.

RUECKING CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the October Term, A. D. 1916, thereof, between Reucking Construction Company, Respondent, and William W. Withnell, Appellant, a manifest error hath happened, to the great damage of the said William W. Withnell as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 14th day of March, next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12th day of February, A. D. 1917.

Issued at office in the City of Jefferson with the seal of the District Court of the United States for the Central Division of the Western district of Missouri, dated as aforesaid.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

JOHN B. WARNER,
Clerk United States District Court for the Central Division, Western Dist., Mo.,
By H. C. GEISBERG, *Deputy.*

Allowed by—

W. W. GRAVES,
Chief Justice Supreme Court of Missouri.

[Endorsed:] 17544. Ruecking Construction Co. vs. Withnell. Writ of Error. Filed Feb. 12, 1917. J. D. Allen, Clerk.

2 In the Supreme Court of Missouri.

STATE OF MISSOURI,
City of Jefferson, ss:

In obedience to the command of the foregoing writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Missouri, at office in the City of Jefferson, State of Missouri, this 21 day of February, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of said Court.

3 Be it remembered, that on the 19th day of October, 1915, the following proceedings were had and entered of record in the case of Ruecking Construction Company, respondent, versus William W. Withnell, appellant:

Come now the said parties, by attorneys, and submit this cause to the Court on briefs; and the court doth grant leave to said parties, upon their stipulation, to file the original special tax bills herein, being Exhibits A, B, C, D, E, F, G, H, I, K, L, and M.

Exhibit "A" is in words and figures as follows:

(Here copy face of tax bill, Ex. "A.")

And is identical in form and substance with Exhibits B, C, D, E, F, G, H, I, and M.

Exhibit "K" is in words and figures as follows:

(Here copy face of tax bill, Ex. "K.")

And Exhibit "L" is in words and figures as follows:

(Here copy face of tax bill, Ex. "L.")

And thereafter, to-wit, on the 31st day of March, 1916, the following further proceedings were had and entered of record in said cause:

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he had lost by reason of the said judgment, and that the said appellant recover against the said respondent his costs and charges herein expended and have execution therefor. (Opinion filed.)

Which said Exhibits "A," "K" and "L" are in words and figures as follows:

(Here follow exhibits marked pages 4, 5, and 6.)

CHART

TOO

LARGE

FOR

FILMING

7 Which said opinion (formal parts omitted) is in words and figures as follows:

This is a suit to recover upon twelve special tax bills issued by the City of St. Louis to the plaintiff contractor in connection with the paving of Broadway between Osage and Neosho Streets in the City of St. Louis. The petition was in twelve counts. Ten of said counts were each for the sum of $187.50 and sought to enforce liens against defendant's lots 4, 5, 6, 7 and 8 in city block No. 2609 and lots 7, 8, 9, 10 and 11 in city block No. 2608. Count No. 11 was for the sum of $3,097.05 and sought to enforce the lien against an irregular unplatted tract of ground located in city block No. 2601. Count No. 12 was for $2,745.28 and sought to establish a lien against an unplatted portion of ground located in city block No. 2620. Among other defenses the answer to each count alleged that other land similar in location to defendant's land was not assessed and that the assessments made were in excess of any possible benefit to defendant's property and amounted to depriving the defendant of his property without due process of law and denied him the equal protection of the law, in violation of section 1 of the 14th amendment to the Constitution of the United States.

The benefit district was fixed by ordinance as prescribed by section 14 of article 6 of the Charter of St. Louis, which was in effect on October 18, 1906, the date the ordinance was passed. The said charter provision provided that the benefit district should be established as follows:

"A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots front-

8 ing on the street to be improved. If the line drawn midway as above described would divide any lot lengthwise or approximately lengthwise, and the average distance from the midway line so drawn to the nearer boundary line of the lot is less than twenty-five feet, the district line shall in such case diverge to and follow the said nearer boundary line. If there is no parallel or converging street on either side of the street to be improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved, but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located," etc.

As provided by said charter, one-fourth of the cost of the improvement was assessed against the property fronting on said street, in proportion to its frontage, and three-fourths of the cost thereof was assessed against the property contained in the benefit district in proportion to the area of the respective tracts of land located in said district.

The boundary lines of the benefit district are very irregular, due

to the fact that a portion of the improved street intersects some converging streets at an angle of about forty-five degrees, and further due to the fact that at some points along the street improved the next parallel street on either side of Broadway were not the same distance from Broadway. In following the mandates of the ordinance and the provisions of the St. Louis charter, this necessitated the boundary lines of said benefit district being located at varying distances from the street which was improved. At some points the boundary line converges to the edge of the improved street. At other points, it is as far as 298.5 feet from the improved street. Ten of defendant's lots which were included in the benefit district extended a distance of one hundred and twenty feet from the improved street. The tract of land mentioned in count No. 11 was irregular in shape and, at one point, extended 252.3 feet west of the improved street, having a frontage of 268.2 feet on
9 Broadway. The tract of land mentioned in count No. 12 had a frontage of 430.16 feet on Broadway and, at one point, extended 218.01 feet west of the west line of the improved street.

Opinion.

Due to the conclusion which we have reached in the case, it will be necessary to consider but one question, to wit: Does the ordinance, fixing the boundary lines of the present benefit district in conformity with the requirements of Sec. 14 of Article 6 of the Charter of St. Louis, as it existed October 18, 1906, violate the 14th Amendment to the Constitution of the United States? This point has been directly passed upon by this Court in a number of opinions in which it was held that similar proceedings did not work a violation of said constitutional provision. In the recent case of Schneider Granite Company v. Gast Realty & Investment Company, et al., 259 Mo. 153, this point was again presented and the cases announcing the rule in the earlier cases were cited and followed. That case was taken by writ of error to the Supreme Court of the United States and in a recent opinion by that Court, the rule heretofore declared by this Court was overruled and the contrary rule announced, Gast Realty & Investment Company v. Schneider Granite Company, — U. S. —, 36 Supreme Court Reporter 254. In that case, Mr. Justice Holmes, speaking for the Court, said:

"The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near 500 feet when it encountered such a tract, and on the opposite side of the street was 150 and 240 feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the

ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts."

We think the rule above announced by the United States Supreme Court is directly in point in the case at bar and that, therefore, the same must now be followed. The boundary lines of the benefit district in the present case varied in distance from the improved street from less than one inch at the closest point to 298.5 feet at the most distant point. Land was included or excluded from the benefit district, not because of benefit or lack of benefit to be derived from the improvement made but rather "in blind obedience to a rule that required the result." The ordinance in the Gast case having been held bad, it necessarily follows that the present ordinance must meet a like fate.

The judgment is, therefore, reversed.

Roy, C., concurs.

FRED L. WILLIAMS, *C.*

Per Curiam: The foregoing opinion by Williams, C., is adopted as the opinion of the Court. All of the Judges concur.

And thereafter, to-wit, on the 10th day of April, 1916, the following proceedings were had and entered of record in said cause:

Comes now the said respondent, by attorney, and files its motion to transfer this cause to the court in banc, and for a rehearing herein and also for modification of the opinion of the Court. Which motion (the formal parts thereof omitted) is in words and figures as follows, to-wit:

"Respondent's Motion to Transfer to Court en Banc, for Rehearing, and for Modification, and Brief.

Now comes respondent and moves the Court to transfer the above-entitled cause from division No. 2 to the court en banc, and, for the grounds of this motion, respondent says that the opinion heretofore rendered by division No. 2 in said cause is based upon, and involves, a constitutional question arising under the Constitution of the United States, and is based upon an interpretation of the Constitution of the United States adverse to respondent, and that under such circumstances, under Section 4 of Article VI. of the Constitution of the State of Missouri, Amendment of 1890, respondent is entitled, as a matter of right, to have said cause transferred to the court en banc.

In the event that this motion is denied, respondent moves this Court to grant it a rehearing in the above-entitled cause, and for

grounds of said motion states that it is entitled to a rehearing of said cause for the following reasons:

First. Respondent had no opportunity to argue in this case when the same was submitted and to discuss or argue the force and effect of the decision of the United States Supreme Court thereafter rendered by that court in the case of Gast Realty & Investment Company et al. v. Schneider Granite Company et al.

Second. This Court, in deciding this case, overlooked the opinion of the United States Supreme Court rendered in the case of Gast Realty & Investment Company et al. v. Schneider Granite Company et al. on the motion for a rehearing, which opinion, so rendered by the Supreme Court of the United States on the motion for rehearing, explained and modified the original opinion of said court and specifically provided that the original decision in the Gast case was limited to the specific ordinance involved in that case, to the assessment of the three-fourths determined in the mode described in said ordinance, and by the terms of said modifying opinion explained that the Supreme Court of the United States did not intend its
13 original opinion to apply to the amount due respondent, calculated upon the "front foot" basis.

Respondent further moves the Court that in the event that the motion to transfer this cause to the court en banc, and the motion for a rehearing, herewith filed, be overruled, that then in that event this Court shall modify the decree heretofore entered in this cause so as to permit respondent to test its right to recover the one-fourth of said special tax bills assessed upon the "front-foot" basis, and, to that end, to either modify the opinion so as to permit respondent to maintain and establish this right, or else to remand said cause so that this question may be tried in the lower court.

And for the grounds of this motion respondent says that the decision of the Supreme Court of the United States in the said Gast Realty & Investment Company et al. v. Schneider Granite Company et al. case, on the motion for rehearing, which was filed in that cause, expressly states that the decision of the Supreme Court is limited to the particular ordinance under which the special tax bills were issued to the Schneider Granite Company and was expressly limited to the assessment of three-fourths of the special tax ascertained and determined under an area basis, and did not in any way apply to the one-fourth assessed upon the "front-foot" basis.

A certified copy of the memorandum of opinion rendered by Mr. Justice Holmes on behalf of the Supreme Court of the United States on said motion for a rehearing, is herewith filed and made a part hereof."

14 Supreme Court of the United States, October Term, 1915.

No. 211.

GAST REALTY AND INVESTMENT COMPANY and EMILY GAST, Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COMPANY.

In Error to the Supreme Court of the State of Missouri.

(January 31, 1916.)

(Reported 240 U. S. 55.)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to collect a tax for paving Broadway, a street in St. Louis, levied upon land of the defendants fronting upon that street. The plaintiff, defendant in error, did the work, received an assignment of the tax and got a judgment for the amount. The only question here is whether the ordinance levying the tax under the charter of the city is consistent with the Fourteenth Amendment of the Constitution of the United States. The charter provides that one-fourth of the total cost shall be levied upon all the property fronting upon or adjoining the improvement according to frontage and three-fourths according to area upon all the property in the district ascertained as follows: "A line shal be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. * * * If
15 there is no parallel or converging street on either side of the street improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located." The defendants' land has a frontage on the west side of Broadway of 1,083.88 feet out of a total in the district constituted said to be 4,372 feet. It is an undivided tract extending back nearly a thousand feet to Church Road. On the south the adjoining property was divided into lots of small depth, and on the opposite side of Broadway the next parallel street was about 300 feet from Broadway. The ordinance establishing the taxing district treated Church Road as the next parallel street within the meaning of the charter, and

included the defendants' tract to a depth of between four and five hundred feet, while the small lots next to it were included to only about 100 feet, the opposite lots to about 150 feet and another undivided tract on the east of Broadway, was included by average distance to a depth of 240 feet. The ordinance establishing these lines was held to follow the charter and to be consistent with the Fourteenth Amendment by the Supreme Court of the State. (259 Mo. 153.)

The legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. (Houck v. Little River Drainage District, 239 U. S. 254, 262.) The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. (French v. Barber Asphalt Co., 181 U. S. 324; Cass Farm Co. v. Detroit, 181 U. S. 396, 397.) So in the case of a square bounded by principal streets the land might be assessed half way back from the improvement to the next street. (Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430.) But as is implied by Houck v. Little River Drainage District, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact. (Martin v. District of Columbia, 205 U. S. 135, 139.)

16 The City of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, Gilsonite Roofing & Paving Co. v. St. Louis Fair Association, 231 Mo. 589; Granite Bituminous Paving Co. v. Fleming, 251 Mo. 210; Loth v. St. Louis, 257 Mo. 399; Wm. R. Bush Construction Co. v. Withnell, 185 Mo. App. 408. The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be

regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the State courts.

Judgment reversed.

By stipulation of counsel the same judgment will be entered in case No. 210.

17 *Memorandum of March 20, 1916, on Motion for Leave to File Petition for Rehearing.*

Our decision is limited, of course, to the particular ordinance before the Court; to the assessment of three-quarters determined in the mode described, and to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law.

Motion for leave to file petition for rehearing denied.

NOTE.—Cause No. 211 was No. 16,439 in the Supreme Court of Missouri, and Cause No. 210 was No. 16,414.

18 Now at this day, the court having considered and fully understood the motions of said respondent for a rehearing herein and to transfer this cause to Court in Banc, doth order that said motions be sustained and said cause transferred to court in banc.

And thereafter, to-wit, on the 14th day of April, 1916, the following further proceedings were had and entered of record in said cause.

Come now the said parties, by attorneys, and file their stipulation to continue this cause to the October Term, 1916.

And thereafter, to-wit, on the 4th day of May, 1916, the following further proceedings were had and entered of record in said cause.

Come now the said parties, by attorneys, and upon their stipulation filed herein, it is ordered by the court that said cause be continued to the October term, 1916.

And thereafter, to-wit, on the 24th day of October, 1916, the following further proceedings were had and entered of record in said cause:

Come now the said parties, by attorneys, and after argument herein submit this cause to the court, with leave of five days to the appellant to file reply brief herein.

And thereafter, to-wit, on the 21st day of December, 1916, the following further proceedings were had and entered of record in said cause:

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant costs and charges herein expended and have therefore execution. (Opinion filed.)

Which opinion (omitting formal parts) is in words and figures as follows, to-wit:

19 This is a suit brought by the Ruecking Construction Company in the Circuit Court of the City of St. Louis, in 12 counts on 12 special tax bills issued by said city to the construction company for the paving of Broadway between Osage and Neosho streets, a distance of six blocks. William W. Withnell, the defendant, is the owner of the property against which it is sought to enforce the lien of the tax bills. The first five counts of the petition are against five lots in city block 2609 lying east of Broadway between Montana and Gasconade streets. The succeeding five counts are against five lots in city block 2608 on the east side of Broadway between Montana and Osage streets. The eleventh count is against a lot in city block 2621 on the west side of Broadway between Gasconade and Meramec streets; and the twelfth count is against a lot in city block 2620 on the west side of Broadway between Gasconade and Meramec streets. The first ten counts are on tax bills for $187.69 each. The eleventh count is on a tax bill for $3097.05; and the twelfth count is on a tax bill for $2745.28.

20 The petition alleged the corporate nature of the plaintiff, that the defendant was the owner of the property described and that the City of St. Louis, by virtue of Ordinance No. 22604, contracted with plaintiff for the paving of Broadway between the limits named; that by a provision of the charter of said city, as amended October 22, 1901, the cost of the work was chargeable, in the name of the owner, to the abutting property, to the extent of one-fourth according to its frontage and to three-fourths according to its area; that by the terms of the contract and said Ordinance No. 22604 the materials to be used and the manner in which the work was to be done were prescribed; that plaintiff fully performed and completed the work in a skillful and workmanlike manner and in accordance with the contract and ordinance; that the president of the Board of Public Improvements had charge of the work and when the same was completed computed its cost and assessed the value as a tax bill against the property of the defendant in proportion to its frontage and area and made out the tax bills therefor; that the just proportion of the cost of the work chargeable to the property described is the amount for which the bill was made out; that the particulars of same appear from a bill filed as an exhibit therewith; that the president of the Board of Public Improvements who made out the tax bill registered the same in his office and certified and delivered it to the Comptroller and took his receipt therefor, and that the Comptroller registered and countersigned the bill, delivered it to plaintiff and that he is the owner of same; that by virtue of the provisions of the charter and the facts

aforesaid the bill became and is a lien against the lots described for special taxes and that on March 2, 1908, plaintiff demanded of defendant payment of the bill, which was refused, and
21 that same is still due and unpaid; thereupon follows a prayer for judgment of the amount of the tax bill, with interest at the rate of 8% per annum after maturity. The facts set forth are those which appear in an amended petition filed by plaintiff on May 23, 1910, by leave of court correcting certain errors in the original petition.

Defendant filed an answer, together with a cross-bill asking affirmative relief.

The answer consists (1) of a general denial, (2) an allegation that plaintiff failed to file in the Comptroller's office within ten days after the filing of the original petition the notice referred to in Secs. 9848 and 9849 R. S. 1909, in consequence of which it was averred that the lien of the tax bill had terminated, and (3) that the suit to foreclose the lien was not brought within two years from the date of the tax bill.

The cross-bill prays that the tax bill be declared void and that plaintiff be enjoined from transferring or collecting the same and be ordered to cancel and deliver it into court and that the lien thereof be discharged for the following reasons: (1) that the taxing district had been improperly laid out and thus unlawfully increased the assessment against defendant's property; (2) that by the incorrect location of the district through the workhouse property the city's proportion of the cost of the improvement was greatly lessened and the assessment against the remainder of the property in the district greatly increased; (3) that the assessment is in substantial excess of any possible benefit to defendant's property and is in violation of the fourteenth amendment of the federal constitution; (4) that a large amount of real estate belonging to other
22 persons similarly located with reference to the street to be improved and of like proximity and value to that of defendant's property was not assessed or included in any tax bill for any part of said improvement, thereby depriving defendant of his property without due process of law and denying to him the equal protection of the law by subjecting his property to the lien of said assessment and relieving the property of others, similar in location and value to that of defendant, from said lien; (5) imposing an arbitrary, unjust and unlawful assessment upon property which had not been divided into lots, in violation of the fourteenth amendment of the federal constitution; and (6) in not affording defendant an opportunity to be heard upon the establishment of the district, the benefits derived, upon whom the tax should be levied, the making of the assessment and its apportionment and the enforcement of same, which results in the taking of defendant's property without due process of law, in violation of the fourteenth amendment of the federal constitution.

To the answer and cross-bill plaintiff filed a reply consisting (1) of a general denial of each affirmative allegation therein; (2) alleging that Secs. 9848 and 9849 of the Revised Statutes of the State

of Missouri are either unconstitutional and void or are not applicable to the City of St. Louis or to this cause, because in conflict with the charter of said city, and that the General Assembly was without power to pass a law changing the said charter, and that the tax bills in the suit were issued prior to the passage and adoption of said sections.

A jury being waived, the case was tried before the court,
23 resulting in a finding against the defendant on his cross-bill and in an entry of judgment in favor of the plaintiff on all of the counts in the petition. After a compliance with the necessary formal procedure the defendant perfected an appeal to this court.

I. The memorandum filed herein by his honor Judge Kinsey in rendering the judgment below presents a clear and succinct statement of this case and we will avail ourselves of same wherever it is found necessary in the determination of the issues submitted. As suggested by Judge Kinsey, an orderly presentation of the matter will be best subserved by a consideration, first, of defendant's cross-bill, because if the matters therein set forth are well pleaded and sustained by substantial proof, the defendant is entitled to the relief he asks and it will follow that the issue must be ruled against the plaintiff. With this in view we have set out somewhat in detail defendant's cross-bill; the first, second and a part of the fourth paragraphs of same have reference to alleged defects in the establishment of the assessment district in that it was not established in accordance with the provisions of Sec. 14 of Art. 6 of the charter of the City of St. Louis as the same existed and was in force at the time of these proceedings. (Revised Code St. Louis 1912, Rombauer, p. 365.) Without burdening this opinion with a copy of said section of the charter, we find upon an examination of the record, which includes the plat as well as oral and documentary testimony, that all of the material requirements of this section were complied with in the formation of this district. This question was carefully reviewed by this court in the Collier and Kauffman
24 case (180 Mo. 362) in which it was held that where the record discloses that a district has been laid out in substantial conformity with the charter, the property owner has no ground of complaint. In Meier v. St. Louis (180 Mo. 391) the doctrine in the Collier and Kauffman case was affirmed, as it has been several times subsequent thereto, the last utterance of this court on the subject being found in Kennard v. Eyermann (182 S. W. 737). These precedents suffice under the facts to destroy the force of defendant's contention that the district was not laid out in conformity with the requirements of the charter. Furthermore, the plat of the district shows that the property east and west of Broadway, in the matter of the material subdivision of same for the purpose of this assessment, is treated with the utmost fairness and as much equality as the character of same will permit. Wherever any discrepancy occurs, and it is but seldom, it is due to the irregularity or curving of Broadway, and no other subdivision could have

been made promotive of greater uniformity in the placing of the burdens upon the property in the district.

II. Other grounds of objection urged by the defendant challenge the constitutionality of the charter. So far as the contention that the section in question is violative of the state constitution, we held in Ranney v. Cape Girardeau (255 Mo. 514) and in many earlier cases, that the provisions of the state constitution relating to the uniformity and equality of taxation were not intended to apply to the right of a municipality to make special assessments for local improvements but only to such general or special taxation having for its object the raising of revenue to go into the treasury
25 of the state, county, city or town, as the case might me. In construing said section 14 of article 6 in the Meier case (p. 409) we have also held that the special assessments authorized thereunder did not amount to a taking of the owner's property without due process of law; that the procedure authorized by said section in regard to publication of notice to the property owners satisfies the constitutional requirement and constitutes due process of law as to matters to be passed upon by the tribunal upon which is devolved the duty of ascertaining the facts and acting thereon.

III. There was no evidence offered to sustain the allegations of the cross-bill that the tax bills were confiscatory or that they were disproportionate to the benefits received in that the city had escaped the payment of its just proportion of the cost of the improvement because of its ownership of certain property within the benefit district.

IV. Defendant contends further that the tax imposed results in a taking of his property without due process of law, in violation of the fourteenth amendment of the constitution of the United States, and cites as sustaining this contention the ruling of the Supreme Court of the United States in the recent case of Schneider Granite Company v. Gast Realty & Investment Company (240 U. S. 55) decided in January, 1916, on error from this court. The effect of this ruling, as contended by defendant and as was held in division when the opinion of the federal Supreme Court came down, was that it held invalid the charter provision (Sec. 14, Art. 6, Revised Code St. Louis) authorizing the laying out of benefit dis-
26 tricts for the purpose of levying special assessments for street improvement and as a consequence that the ruling rendered invalid all ordinances based upon such charter provision. A more careful review of the opinion renders it evident that it was not intended thereby to hold the charter provision in question invalid and thus destroy the special taxing system of the City of St. Louis so far as same applies to street improvement. Instead of such a sweeping and destructive ruling, it was only meant to condemn the ordinance in the case there under review, as the language of the modified opinion discloses, viz., "Our decision is limited, of course, to the particular ordinance before the court: to the assessment of three-quarters determined in the mode prescribed and to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law." Words could not be

employed to more clearly convey the court's meaning. However, if the modification of the opinion had not been written, a careful scrutiny of the original in the full light of the facts in that particular case leaves no ground for controversy as to the court's meaning. It expressly declares that "the only question is whether the ordinance levying the tax under the charter of the city is consistent with the fourteenth amendment of the constitution of the United States." The right to create taxing districts on the basis of the front foot rule and according to the area rule is not questioned, provided the facts do not disclose palpable injustice to the property owners. The ruling in any event is limited to a consideration of the application of the area rule. Numerous cases are cited as illus-
27 trative of the exercise of the power of special taxation by both the frontage and area rules by municipalities and of its recognition by the United States Supreme Court. In addition to the cases cited the following announce a like doctrine: St. L. & K. C. L. Co. v. Kansas City (Advance Opinions U. S. Sup. Ct., No. 1915, June 5, 1916, p. 647); Wagner v. Leser (239 U. S. 207); Houck v. Lit. R. Dr. Dist. (239 U. S. 254); French v. Barber Asphalt P. Co. (181 U. S. l. c. 343); Webster v. City Fargo (181 U. S. l. c. 398); L. & N. Rd. Co. v. Barber Asphalt P. Co. (197 U. S. l. c. 433); Martin v. Dist. Col. (205 U. S. l. c. 139).

From all of these rulings it is evident that the court did not intend to hold the charter of the City of St. Louis in regard to street improvement invalid but simply decided that the ordinance based upon the charter was invalid in that particular case on account of the unusual facts there presented so far as it was attempted to base the assessments on the area rule. The right of complaint on account of the injustice there evident being limited to persons thus assessed. In this holding no question is raised as to the validity of the ordinance authorizing the levy of taxes for special assessments on the frontage rule. However, this is not necessary to be discussed here. In short, the ruling in the Gast case considered and determined only the fact then before the court and did not assume to determine where a special assessment was levied in conformity with the charter provision and with a proper regard for the rights of the property owners that such assessment would be held invalid. There is, therefore, under this ruling no authority for the contention that the levy of the special assessments in the case at bar was violative of
28 the federal constitution. In view of all of which we are of the opinion that the defendant is not entitled to the affirmative relief for which he prays.

V. Defendant's affirmative defenses demand consideration. He contends that section 9848 R. S. 1909 has not been complied with requiring notice to be lodged with the city Comptroller within ten days after the institution of suits to enforce special tax bills, which notice shall set forth when and in what court the proceeding has been filed. It is conceded that this notice was not given. The tax bills sued on were issued to the plaintiff February 27, 1908; section 9848 was adopted June 1, 1909 (Laws 1909, p. 704) and became operative under the constitution August 16, 1909, or almost one

and one-half years after the bills became liens on the defendant's property and the rights of plaintiff had accrued. There is an absence of anything in this section indicating that it was intended to have a retrospective effect. Defendant contends, however, that as it affects only the remedy and is in the nature of a statute of limitations, it governs the proceedings in this case despite the fact that the cause of action existed before its enactment.

Under the facts defendant's conclusion as to the application of the section to this case is a non sequitur. The nature of the section is such that if operative it not only affects the remedy, but, as we held in Haag v. Ward (186 Mo. 1. c. 344), construing a similar provision, upon its enactment it became a part of the procedure of the case. The tax bills became liens on defendant's property upon the completion of the work, the ascertainment of the cost of same and the delivery of the bills to the plaintiff. (Secs. 24 and 25, Art. 6, St. Louis Charter; Perkinson v. Weber, 251 Mo. 1. c. 191). These steps having been taken before the enactment of the section, plaintiff's right to the enforcement of his lien became vested and consequently within the protection of the constitution forbidding the impairment by legislation of vested rights. The enactment of the section created a condition precedent to the enforcement of the right not existing when the same became vested. Under such circumstances we have held in no uncertain terms that a statute which takes away or impairs a right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already consummated must be deemed retrospective in its operation and hence violative of Sec. 15 of Art. 2 of the state constitution. (Leete v. Bank, 115 Mo. 1. c. 198) The St. Louis Court of Appeals, in construing Sec. 9848, has held, in harmony with the rule announced, that the provisions of the section requiring the giving of notice within the time imposed creates an additional burden upon the plaintiff and purports to create a new defense available to defendant and hence requires that the section be given a prospective and not a retrospective application, although it may be remedial in its nature. (Gils. Con. Co. v. Greffet, 174 Mo. App. 1. c. 180).

VI. Holding as we do that Sec. 9848 is not retrospective, a discussion as to the non-application of the limitations of Sec. 9849 is unnecessary, as by parity of reasoning it is subject to the same rule of construction as Sec. 9848. However, it is contended by defendant that Sec. 9849 constitutes a bar to plaintiff's right of action in two years after the tax bills become due and payable. This contention ignores the fact that the section expressly provides that the limitation shall not apply until two years after the last installment becomes due. The charter (Sec. 25, Art. 6) provides that tax bills may be made payable in installments of not less than three nor more than seven in number and when so payable the limitation does not expire until after the lapse of two years from the date when the last installment becomes due. These tax bills were issued February

27, 1908, in seven installments. Notice of same was served upon the defendant at the time of their issuance. The first installment became due and payable thirty days after notice of the issuance thereof;; the second one year after such notice; the third, two years thereafter; the fourth, three years; the fifth, four years; the sixth, five years; and the seventh, six years. This action was brought to enforce their payment February 26, 1910. The last installment was not due at the time of the institution of this suit, nor at the time of the filing of the amended petition herein on May 23, 1910. Where a bill is payable in installments under the charter the limitation does not expire until after the lapse of two years from the date when the last installment becomes due. Under neither the statute nor the charter is the action barred and we overrule this contention of the defendant. The St. Louis Court of Appeals has so held in Fruin v. Meredith (145 Mo. App. 586).

VII. One of the special defenses made by the defendant is that the original petition did not state a cause of action and that plaintiff's right to recover must fail because the bar of the statute in-
31 tervened between the time of the filing of the original and the amended petition. We have shown that the action was not barred at the time of the filing of the amended petition and, as was tersely said by the trial judge in his memorandum filed herein: "This argument of defendant's may be brushed aside, because it is based on a premise not founded on fact."

Conceding the insufficiency of the original petition, defendant's argument that the amended petition constituted a departure was waived by his answering to the merits and proceeding to trial. To render the plea available that an amended petition constitutes a new cause of action the defendant should stand on his objection thereto and not waive same by answering over and going to trial. (Castleman v. Castleman, 184 Mo. 1. c. 440; Schroeder v. Edwards, 184 S. W. 1. c. 114).

A consideration of the numerous assignments of error and of the record in its entirety discloses nothing prejudicial to the substantial rights of the defendant. It therefore follows that the judgment of the trial court should be affirmed, and it is so ordered. Graves, C. J., Woodson & Revelle, J. J., concur. Blair, J., concurs in paragraphs 1 to 6 inclusive and result. Faris & Bond, J. J., not sitting.

R. F. WALKER, *J.*

And thereafter, to-wit, on the 29th day of December, 1916,
32 the following further proceedings were had and entered of record in said cause:

Comes now the said appellant, by attorney, and files his motion for a rehearing herein.

Which motion (omitting formal parts thereof) is in words and figures as follows, to-wit:

33 *Motion for a Rehearing.*

Now comes William W. Withnell, Appellant in the above entitled cause, and moved the Court for a rehearing therein, and as grounds therefor respectfully states:

1. That the decision in the cause is in direct conflict with an express charter provision, to-wit, Article VI. Section 25 of the Charter of the City of St. Louis.

The Court, speaking of the contention that the lien of the tax bill had lapsed before the filing of the Amended Petition, said:

"This contention ignores the fact that the section expressly provides that the limitation shall not apply until two years after the last installment becomes due."

That Article and Section provides:

* * * "The lien of any tax bill so issued that is not entered satisfied within two years after its maturity, unless proceedings in law have been commenced to collect the same within that time, and shall still be pending, shall be destroyed and of no effect against the land charged therewith; provided, however, that where bills are not paid in installments, the lien thereof shall terminate within two years after their date, unless such proceedings shall have been commenced within that time and be still pending."

It is respectfully submitted that Article VI., Sec. 25 of said Charter contains no such language as ascribed to it by the decision.

We also earnestly protest against the plea of the Statute of Limitations being "brushed aside" on the erroneous theory that the Charter of St. Louis contains the *the* words "that the limitation shall not apply until two years after the last installment becomes due."

The Charter of the City of St. Louis is radically different from the Charter of Kansas City. The Charter of Kansas City does
34 contain these words:

"The lien of all tax bills issued under this section shall continue for a period of one year after the last installment specified therein shall have become due and payable and no longer, unless within said year suit shall have been instituted to collect said tax bill, etc."

Under the Charter of the City of St. Louis all tax bills issued for street improvements were required to be made payable in installments. That was mandatory. Fruin v. Meredith, 145 M. A. l. c. 640. This provision was solely for the benefit of the landowner. The owner had the option to determine the question whether they should be actually paid in installments, or whether they should be paid in bulk. If he elected that the bill should be paid in bulk, by not paying the first installment, then the lien lasted only two years from the date of the bill.

If, however, the landowner elected that they should be paid in installments, by actually paying the first installment when due, that payment fixed the status of the particular bill, as one to be paid in installments. Thereafter, if the landowner failed to me-t any subsequent installment, the option was then with the contractor to de-

clare all the remaining installments due, or to sue on each separate installment within two years of its maturity. The lien of the bill so matured could only last, under this section, two years from that maturity, (the date when the contractor so matured it), and not two years from the maturity designated in the last or several other installments.

But when the landowner, by failing to pay the first installment, thereby elected that the "bills are not (to be) paid in installments," it is expressly provided in this section that "the lien shall terminate within two years after their date.

The construction assigned to this section by the decision absolutely ignores the proviso thereto to the effect that "when bills are not paid in installments, the lien thereof shall terminate within two years after their date."

There are no tax bills issued for street improvements which are not by their terms payable in installments. Unless the construction contended for by the appellant is given to this section, the proviso is absolutely meaningless.

The petition was filed May 26th, 1910, and plaintiff is thereby estopped to claim that the bills were to be paid in installments. Otherwise the action was prematurely brought, because only two of the installments by their terms have matured.

If appellants' contention is correct the lien of the tax bills had lapsed both at the time the original and amended petitions had been filed.

In the Amended Petition it is alleged:

"That on March 2nd, 1908, plaintiff demanded the payment of said bill which was refused and the same is still due and payable and no part thereof has been paid."

Not only has the landowner elected that the bills should not be paid in installments, thus limiting the time to two years from date, but the contractor had also elected that the bills "should not be paid in installments" and thereby fixed the extension of the lien to two years from its date. It is earnestly contended that the lien had lapsed at the time the Amended Petition was filed.

II. The decision in the cause overlooked a point decisive of the case, and called to the Court's attention in Appellant's original brief and argument. The Appellant demurred to the Amended Petition because of its failure to allege that Notice of the issuance of the tax bill was served upon the defendant.

Sec. 25 of Art. Vi. of the Charter of the City of St. Louis, provides:

"Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, and in the name of and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of six per cent per annum after thirty days from notice of its issuance, as hereinafter provided, and if not paid within six months after such notice, then at the rate of eight per cent per annum from the date of said notice: provided, however, that special tax bills payable in installments shall bear interest as hereinafter provided. It shall be the duty of the city marshal, at the request of the holder or owner of any tax bill issued

under this Charter, to serve upon the party or parties named in such tax bill, a notice of the issuance thereof, which service shall be made in the manner provided by law for the service of writ of summons in civil cases. The return of the city marshal as to service shall
36 be conclusive of the facts therein stated, and any person who may be injured by a false return shall have his right of action for damages resulting therefrom against the marshal on his official bond. For the service of each such notice the marshal shall be entitled to the same fee as may be allowed by law for the service of a writ of summons. Whenever the marshal shall make a return of "not Found" against any party, the institution of suit thereafter shall be deemed and taken to be the equivalent of such notice of and demand of payment. In case the owner of the ground is a non-resident of the State, suit may be brought by attachment, which shall be equivalent to notice, and a demand for payment."

The institution of a suit can be deemed the equivalent of such notice only when "the marshal shall make a return of 'not found'."

The Amended Petition contains no allegation that notice of the issuance of the tax bill was served on the landowner as therein provided, or that the marshal made a return of "not found."

This notice was a condition precedent to an action to enforce same and without such allegation no cause of action was stated. In the face of such expressed requirement of notice this Court holds that the Amended Petition, in the absence of such allegation, states a cause of action on said tax bills. This, it is respectfully submitted, is error.

III. That the decision is also in direct conflict with Section 13 of Article VI. of the Charter of the City of St. Louis, in that it holds that a district line drawn ranging from less than one foot away to more than 298 feet away from the street to be improved, and on the opposite side from less than one foot to 285 feet away, and the differences not being based upon the benefits, or lack of benefits conferred, is correctly laid out in conformity therewith. The plain meaning of this provision is that the district lines shall be at a substantial uniform distance from the street to be improved.

There is no reason why the district lines both east and west of Broadway should not have been drawn parallel therewith at a distance of 125 or 150 feet, or even 200 feet. There would then have been at least an approach to uniformity. It is earnestly urged that the application of the midway district line between parallel streets cannot be applied to the facts in the instant case, without violating the defendant's constitutional rights. What reason is there
37 that defendant's property on the Corner of Osage and Broadway, should be taxed back 285 feet, and other property, on the corner of Neosho and Broadway should be taxed back only 120 feet from Broadway?

The application of the Charter method of defining a district applied to "the irregularity or curving of Broadway", the decision concedes, has resulted in discrepancies, (and will probably always result in discrepancies when applied to a curving street,) but that is no more reason why the defendant should be burdened with these

"irregularities" than was the defendant to be burdened therewith in the Gast Case, because of the absence of a parallel street at uniform distance from the street to be improved.

Consequently the method of defining the district as upheld in the Collier, Kauffman and Meier cases cannot be constitutionally applied to the facts in the instant case, and the district was improperly laid out.

IV. The decision is in error in stating that there is no evidence "that the City has escaped the payment of its just proportion of the cost of the improvement because of its ownership of certain property within the benefit district." It is respectfully submitted that the record shows on pages 45 and 46, and the plat shows, that blocks 2663 and 2664 and all of blocks east thereof, are occupied by the City as its "Work House" and that it is all walled in, and that the so-called Piedmont Street is closed, and that the Boiler House of that institution stands right in the line of Piedmont Street, were it continued and not closed. The City would not have paid its just proportion of the area tax, unless the district line had been drawn several hundred feet further East, i. e., between Broadway and the Wharf.

V. That the decision is in conflict with the controlling decision of the United States Supreme Court in the case of St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S. 419, that

"Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the landowner is entitled to be heard as to the amount of his assessment, and upon all questions properly entering into that determination."

That this case and question was duly submitted to the
38 Court in Paragraph I, of Defendant's Supplemental Brief, and must have been overlooked by the Court.

VI. That the decision is in conflict with the controlling decision of the United States Supreme Court in the case of Schneider Granite Company v. Gast Realty Co., 240 U. S. 55, which is decisive of this case. This Court erred in holding that the Charter provisions in question were constitutionally applied to the defendant's land, and did not violate his constitutional rights in levying an assessment in substantial excess of any possible benefits to defendant's property, and in not assessing real estate belonging to other persons similar in location as his, with reference to the street to be improved, and of like proximity and value, thereby depriving defendant of his property without due process of law, and denying him the equal protection of the law, by subjecting his property to a lien and relieving others in similar location from the lien, and imposing an arbitrary, unjust and unlawful assessment, not based upon benefits upon his property, which had not been divided into lots, and in not affording defendant an opportunity to be heard upon the establishment of the district, and the amount of the benefits to the land, and the amount of the assessment, whereas the tax, the method of assessment, the apportionment of same, resulted in taking defendant's property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

VII. The Court erred in finding that the taxing district was laid

out in conformity with Section 14, of Article VI, of the Charter of the City of St. Louis, and as so defined was constitutionally applied to defendant's property.

VIII. The Court erred in affirming judgment enforcing said tax bills against defendant's property, when on the undisputed facts it was shown that at no stage of the proceedings for the assessment thereof, was a hearing accorded to the property owners, either on the question of the limits of the taxing district, or the apportionment of the tax, which resulted in unconstitutionally depriving defendant of his property without due process of law, and in denying
39 to defendant the equal protection of the laws, as provided in the first section of the Fourteenth Amendment of the Constitution of the United States;

IX. The Court erred in affirming a judgment enforcing said tax bills because it thereby deprived defendant of his property without due process of law, and denied him the equal protection of the law, as provided by the Constitution of the United States.

X. The Court erred in affirming a judgment for the plaintiff when the undisputed facts show that property belonging to other persons similarly located to Broadway, and of like proximity, and value as defendant's property, is not assessed or included in any tax bill, and Section 14 of Article VI, of the Charter of said City of St. Louis, is void and unconstitutional, and violated Section 1 of Article Fourteen of the Amendments to the Constitution of the United States, by denying to defendant the equal protection of the laws, by subjecting all defendant's property to the lien of said assessment, and in not subjecting to said lien other land adjoining Broadway similar in location and value to defendant's, and the judgment should have been for defendant;

XI. The Court erred in affirming judgment for plaintiff when the undisputed facts show that Section 14 of Article VI, of said Charter operated to divide all property contiguous to the street to be improved into lots, which had not been subdivided by the owner, and to impose an arbitrary, unjust and unlawful assessment on property which had not been divided into lots, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

40 And thereafter, to-wit, on the 30th day of December, 1916, the following further proceedings were had and entered of record in said cause:

Comes now the said respondent, by its attorney, and filed its memorandum in opposition to appellants motion for a rehearing herein.

And thereafter, to-wit, on the 17th day of January, 1917, the following further proceedings were had and entered of record in said cause:

Now at this day, the court having considered and fully understood appellants motion for a rehearing herein, doth order that said motion be and the same is hereby overruled.

And afterwards, to-wit, on the 12th day of February, 1917, William W. Withnell, by his attorneys, E. T. & C. B. Allen, presented to the Honorable W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri, his petition for a writ of error to the Judge of the Supreme Court of the State of Missouri, praying that a citation be granted to the Ruecking Construction Company, and that the bond therewith presented be approved, and that said bond and writ of error operate as a supersedeas, that the errors complained of in the assignment of errors therewith presented might be reviewed by the Supreme Court of the United States, and the judgment of the Supreme Court of Missouri be reversed.

Thereafter, to-wit, on said 12th day of February, 1917, the writ of error prayed for in the aforesaid petition was allowed, and the writ of error to operate as a supersedeas, and the bond for that purpose fixed at the sum of Five Hundred Dollars, and the bond approved by the Hon. W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri.

Thereafter, to-wit, on the 12th day of February, 1917, said petition for a writ of error was filed in the office of the Clerk of the Supreme Court of the State of Missouri, which said petition is in words and figures as follows, to-wit:

41 In the Supreme Court of the United States, October Term, 1916.

In Equity.

WILLIAM W. WITHNELL, Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY, Defendant in Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes William W. Withnell, plaintiff in error in the above entitled cause, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above cause by the Supreme Court of the State of Missouri, it being the highest court of said State in which a decision could be had on the said suit between the Ruecking Construction Company and William W. Withnell, manifest error has occurred, greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of an ordinance and charter provisions of the City of St. Louis, State of Missouri, exercised under said state, on the ground of repugnancy to the Constitution and laws of the United States, and that the decision was in favor of the validity of said ordinance and charter provisions, and against the right of

the petitioner to be protected against taking his property without due process of law, and to the equal protection of the laws, guaranteed him by the Constitution of the United States, in that the judgment of the Court enforcing the special assessment against petitioner's property, resulted, so far as the area assessment, in unconstitutionally depriving the petitioner of his property without due process of law, and by denying to your petitioner the equal protection of the laws, as provided in the first section of the Fourteenth Amendment to the Constitution of the United States, because (*a*) the undisputed evidence shows that the property was assessed a tax in sub-
42 stantial excess of any possible benefits specially accruing thereto from the improvement, and because at no stage in the assessment proceeding by the political subdivision of St. Louis was the petitioner allowed an opportunity to be heard upon the amount of said assessment or the laying out of the assessment district; (*b*) the district was not based upon the special benefits to accrue to the property taxed, but was laid out in blind obedience to a charter provision which required the district lines to be drawn midway between the street to be improved and the next parallel or converging street, no matter how far distant; (*c*) that property belonging to others of like proximity and value as plaintiff in error's was not assessed; (*d*) and property of others nearer to the improved street than petitioner's was not assessed; all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed; that a citation be granted and signed; that the bond herewith presented be approved, and that in compliance with the statutes in such cases made and provided, the bond and writ of error may operate as a supersedeas; that the errors complained of in the Assignment of Errors herewith filed may be reviewed by the Supreme Court of the United States, and that the judgment aforesaid of the Supreme Court of Missouri may be reversed.

WM. W. WITHNELL,

By E. T. AND C. B. ALLEN,
Attorneys for Plaintiff in Error.

C. B. ALLEN,
Of Counsel.

The Writ of Error as prayed for in the foregoing petition is hereby allowed, this 12 day of February, 1917, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $500, and is hereby approved.

Dated, Jefferson City, Missouri, this 12 day of February, 1917.

W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

43 And on the same day, to-wit, the 12th day of February, 1917, there was filed in the office of the Clerk of the Supreme

Court of the State of Missouri, by William W. Withnell, his assignment of errors in said cause, which is in words and figures as follows, to-wit:

44 Supreme Court of the United States, October Term, 1917.

In Equity.

WILLIAM W. WITHNELL, Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY, Defendant in Error.

Assignment of Errors.

Now comes William W. Withnell, Plaintiff in Error, and respectfully submits that in the record of the final judgment of the Supreme Court of Missouri, in the above entitled cause, there is manifest error, in this, to-wit:

I. The Supreme Court of Missouri erred in holding in this cause that the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis do not provide for the taking of property without due process of law, contrary to the provisions of Section one of the Fourteenth Amendment to the Constitution of the United States;

II. The Supreme Court of Missouri erred in holding in this case that the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis do not deny to persons within the jurisdiction of the City of St. Louis, Missouri, and particularly such persons owning land in said City, including plaintiff in error, the equal protection of the law;

III. The Supreme Court of the State of Missouri erred in holding in this case that the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis was constitutionally applied to the plaintiffs in error property, when it is apparent from the record that the area assessment against plaintiffs in error property was not based upon the special benefits accruing to it from the improvement, but was fixed in blind obedience to an arbitrary method provided by the Charter, which resulted (*a*) in a greatly disproportionate burden upon the plaintiff in error, because the property of others similarly located and of like proximity
45 and value to the street to be improved was not assessed; and (*b*) thereby denying plaintiff in error the equal protection of the laws, and in taking his property without due process of law;

IV. The Supreme Court of Missouri erred in holding that a special assessment district laid out in pursuance of the provisions of Section 14, Article VI. of the Charter of the City of St. Louis,

with irregular boundary lines, which was not at a substantially uniform distance from the street to be improved, when such irregularity was not due to any difference in the special benefits to plaintiffs in error property, and did not provide for the taking of property without due process of law, and did not deny to such property holder the equal protection of the laws, contrary to the provisions of Section one of the Fourteenth Amendment to the Constitution of the United States;

V. The Supreme Court of Missouri erred in holding that Section 14 of Article VI. of the Charter of the City of St. Louis, provided for a hearing to the plaintiff in error as to the amount of his assessment, and upon all questions properly entering into that determination, and did not provide for the taking of plaintiff in error's property without due process of law.

E. T. AND C. B. ALLEN,
Solicitors of Plaintiff-in-Error.

CLIFFORD B. ALLEN,
Of Counsel.

46 And on the same day, to-wit, the 12th day of February, 1917, William W. Withnell, filed in the office of the Clerk of the Supreme Court of the State of Missouri, his supersedeas bond in said cause, which is in words and figures as follows, to-wit:

47 In the Supreme Court of the United States, October Term, 1916.

In Equity.

WILLIAM W. WITHNELL, Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY, Defendant in Error.

Know all men by these presents, that we, William W. Withnell, as principal, and the Ætna Accident and Liability Company, as surety, are held and firmly bound unto the Ruecking Construction Company, in the sum of Five Hundred dollars, to be paid to said obligee, its successors and assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, legal representatives and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at St. Louis, Mo., this 8th day of February, 1917.

Whereas, the above named plaintiff in error, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM W. WITHNELL.
THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
[SEAL.] By FRANK MEAD,
Resident Vice President.

Attest:

LON W. HARLOW,
Resident Asst. Secretary.

Approved to operate as a supersedeas.

W. W. GRAVES,
Chief Justice Supreme Court of Missouri.

48 And on the same day, to-wit, the 14th day of February, 1917, the said William W. Withnell filed his præcipe indicating portions of the record to be incorporated into the transcript, which is in words and figures as follows, to-wit:

49 In the Supreme Court of the United States, October Term, 1916.

WILLIAM W. WITHNELL, Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY, Defendant in Error.

Præcipe Indicating Portions of Record to be Incorporated into the Transcript to be Sent to the Supreme Court of the United States.

To Jacob D. Allen, Esq., Clerk of the Supreme Court of Missouri:

Please include in the transcript of record to be sent by you in obedience to the command of the writ of error in the case, certified copy of the entire record as found in your office, consisting of the following:

All the record entries in your Court; copy of the judgment; copy of the Abstract of the Record of the Circuit Court, omitting formal parts and certificates, as agreed upon by the parties as indicated in the transcript to be sent you; copy of order and opinion in Division No. 2; copy of motion to transfer to Court in banc; order of Court transferring case to Court in banc; copy of order and opinion of the Court in banc; copy of motion for a rehearing filed by William W. Withnell, and the order of Court overruling same; the application of William W. Withnell for a writ of error; the assignment of errors

and the supersedeas bond therefor. In addition to all of these you will, of course, attach the original citation and original writ of error to your transcript.

E. T. AND C. B. ALLEN,
Attorneys for William W. Withnell.

C. B. ALLEN,
Of Counsel.

Received, a Copy of the Above Precipe, this 13 day of February, 1917.

RUECKING CONSTRUCTION COMPANY,
BENJAMIN SCHURMACHER,
By THEODORE RASSIER,
GEO. M. BLOCK, *Its Attorneys.*

50 STATE OF MISSOURI,
City of Jefferson, ss:

Be it remembered, that heretofore, to-wit, on the 15th day of March, 1913, a certified copy of the judgment of the Circuit Court of the City of St. Louis, State of Missouri, and order granting appeal to the Supreme Court of the State of Missouri, was received and filed in the office of the Clerk of the Supreme Court of the State of Missouri; said certified copy of the judgment and order granting appeal, etc., is set out on pages 60 to 67, inclusive, of this record.

51 On the 2nd day of September, 1915, the following Abstract of the Record was filed in this cause:

On May 23rd, 1910, the plaintiff filed by leave of court an Amended Petition, in twelve counts, ten of which were directed against Lots Nos. 8, 7, 6, 5 and 4 of City Block No. 2609, and Lots Nos. 7, 8, 9, 10 and 11 in City Block No. 2608, of said City of St. Louis, Missouri, are each for the sum of $187.69, with eight per cent interest thereon from March 2nd, 1908, and each of said counts with the changes necessitated by the changes in the descriptions of said lots, is in words and figures as follows (caption and signature omitted):

Amended Petition.

I. And now comes the plaintiff in above entitled cause and by leave of Court first had and obtained, files this, its amended petition, and states:

That the plaintiff at the times hereinafter mentioned was and it now is, a corporation duly incorporated and existing under the laws of the State of Missouri;

Plaintiff further states that the City of St. Louis is a municipal corporation under and by virtue of the laws of the State of Missouri;

Plaintiff further states that at the times hereinafter mentioned, the defendant was and now is the owner of the following described real estate, lying, being and situate in the City of St. Louis and State of

Missouri, to-wit: Lot 8 in City Block No. 2609, having an aggregate front of 25 feet on Broadway by a depth of 120 feet, bounded north by Withnell, east by alley, south by Mayer and west by Broadway; That the said City of St. Louis, by virtue of its Charter and as recommended by the Board of Public Improvements of said city, passed a certain ordinance, being numbered 22,604, and entitled an "Ordinance to improve Broadway between Neosho Street and Osage Street," which ordinance was duly approved by the Mayor of the City of St. Louis on October 18th, 1906, and which among other matters specified the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and that the cost thereof shall be levied and assessed as a special tax against all the property within a district defined and bounded by Section 14 of Article 6 of the Charter of the City of St. Louis;

That the City of St. Louis aforesaid, through said Board of Public Improvements, under and by virtue of said ordinance contracted with the plaintiff, under contract numbered 7882, for the doing of said work and furnishing of the necessary materials;

52 That the plaintiff entered into the performance of said contract and has fully performed and completed said work, in a skillful and workmanlike manner and in accordance with said contract and ordinance;

That the President of the Board of Public Improvements had charge of said work and did, when the same was fully completed, compute the cost thereof and assess it as a special tax against the property of said district as required by said charter and said ordinance, in the ratio of one-fourth against the property fronting on said work in proportion to its frontage and three-fourths against the property in the district as defined by said Charter;

That the just proportion of the cost of said work, as aforesaid, and chargeable to the lot of ground above described is the sum of fifty-nine dollars ($59.37) and thirty-seven cents, according to its frontage, at the rate of two and thirty-seven thousand four hundred and eighty-four hundred-thousandths dollars ($2.37484) per front foot (said lot having a front on said work of twenty-five (25) feet, and one hundred and twenty-eight dollars and thirty-two cents ($128.32) according to its area at the rate of four and twenty-seven thousand seven hundred and twenty-one hundred-thousandths dollars ($4.27721) per one hundred square feet of area; or a total of one hundred and eighty-seven dollars and sixty-nine cents ($187.69); the items and particulars of which will appear by the tax bill herewith filed and made part hereof and marked "Exhibit A";

That said President of the Board of Public Improvements on February 27th, 1908, made out said tax bills and registered the same in his office in full and certified and delivered the same to the Comptroller of said city and took his receipt therefor, and said Comptroller registered and countersigned and delivered the same to plaintiff, who is still the owner thereof;

That by virtue of the premises and provisions of the Charter afore-

said said tax bill became and is a lien against the lot of ground above described;

That on March 2nd, 1908, plaintiff demanded the payment of said tax bill, which was refused and the same is still due and payable, and no part thereof has been paid;

Wherefore, plaintiff prays judgment in said sum of one hundred and eighty-seven dollars and sixty-nine cents ($187.69) with eight per cent interest thereon from March 2nd, 1908, and for costs of suit.

Counts ten and eleven of said Amended Petition are in words and figures as follows, to-wit:

53 (10.) And for another and further cause of action, plaintiff states:

That the plaintiff, at the times hereinafter mentioned was and it now is, a corporation duly incorporated and existing under the laws of the State of Missouri;

Plaintiff further states that the City of St. Louis is a municipal corporation under and by virtue of the laws of the State of Missouri;

Plaintiff further states that at the times hereinafter mentioned the defendant was and now is the owner of the following described real estate, lying, being and situate in the City of St. Louis and State of Missouri, to-wit: a certain lot of ground in the City of St. Louis, and State of Missouri, in City Block No. 2621, beginning at a point where the west line of Broadway intersects the north line of Meramec street, thence west along the north line of Meramec street seventy-four and fifty-five-hundredths feet (74.55'), thence northwardly six hundred and twenty-five and twenty-six-one-hundredths (625.26) feet to a point in the south line of Gasconade street, distant two hundred and fifty-two and thirty-hundredths (252.30) feet west of the west line of Broadway, thence east along the south line of Gasconade street thirty-three and forty-nine-hundredths (33.49) feet, thence south along the division line of City Blocks 2620 and 2621, three hundred and sixty-nine and twenty-one-hundredths (369.21) feet to a point in the west line of Broadway, distant two hundred and sixty-eight and twenty-hundredths (268.20) feet north of Meramec, thence south along the west line of Broadway two hundred and sixty-eight and twenty-hundredths (268.20) feet to the place of beginning;

That the said City of St. Louis, by virtue of its Charter and as recommended by the Board of Public Improvements of said city, passed a certain ordinance, being numbered 22,604 and entitled "An Ordinance to improve Broadway between Neosho street and Osage street," which ordinance was duly approved by the Mayor of said City of St. Louis on October 18th, 1906, and which among other matters specified the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and that the cost thereof shall be levied and assessed as a special tax against all the property within a district defined and bounded by Section 14 of Article 6 of the Charter of the City of St. Louis;

That the City of St. Louis aforesaid, through said Board of Public Improvements, under and by virtue of said ordinance contracted

with the plaintiff, under contract numbered 7882, for the doing of said work and furnishing of the necessary materials;

That the plaintiff entered into the performance of said contract and has fully performed and completed said work, in a skillful and workmanlike manner and in accordance with said contract and ordinance;

54 That the President of the Board of Public Improvements had charge of said work and did, when the same was fully completed, compute the cost thereof and assessed it as a special tax against the property of said district as required by said Charter and said ordinance, in the ratio of one-fourth against the property fronting on said work in proportion to its frontage and three-fourths against the property in the district as defined by said Charter.

That the just proportion of the cost of said work, as aforesaid, and chargeable to the lot of ground above described is the sum of six hundred and thirty-six dollars and ninety-three cents ($636.93) according to its frontage, at the rate of two and thirty-seven thousand four hundred and eighty-four hundred-thousandths dollars ($2.37484) per front foot, said lot having a front on said work of two hundred and sixty-eight and twenty one-hundredths (268.20) feet and two thousand four hundred and sixty dollars and twelve cents ($2,460.12) according to its area at the rate of four and twenty-seven thousand seven hundred and twenty-one hundred-thousandths dollars ($4.27721) per one hundred square feet of area; or a total of three thousand and ninety-seven dollars and five cents ($3,097.05); the items and particulars of which will appear by the tax bill herewith filed and made a part hereof and marked "Exhibit K";

That said President of the Board of Public Improvements on February 27th, 1908, made out said tax bills and registered the same in his office in full and certified and delivered the same to the Comptroller of said city and took his receipt therefor, and said Comptroller registered and countersigned and delivered the same to plaintiff, who is still the owner thereof;

That the said President of the Board of Public Improvements, in issuing said last mentioned tax bill, described the above mentioned property as follows, to-wit: Lot No. — in City Block No. 2621, said ground having an aggregate front of 268.20-625.26 feet, by a depth of 74.55 33.49 feet, bounded north by Gasconade street, east by Broadway, *et al.*, south by Meramec street and west by boundary line of district;

That by virtue of the premises and provisions of the Charter aforesaid, said tax bill became and is a lien against the lot of ground above described;

That on March 2nd, 1908, plaintiff demanded the payment of said tax bill, which was refused and the same is still due and payable, and no part thereof has been paid;

Wherefore, plaintiff prays judgment in said sum of three thousand and ninety-seven dollars and five cents ($3,097.05) with eight (8) per cent interest thereon from March 2nd, 1908, and for costs of suit.

55 (11.) And for another and further cause of action, plaintiff states:

That the plaintiff, at the times hereinafter mentioned was and it now is, a corporation duly incorporated and existing under the laws of the State of Missouri;

Plaintiff further states that the City of St. Louis is a municipal corporation under and by virtue of the laws of the State of Missouri;

Plaintiff further states that at the times hereinafter mentioned, the defendant was and now is the owner of the following described real estate, lying, being and situate in the City of St. Louis and State of Missouri, to-wit: a lot in City Block 2620, beginning at a point in the west line of Broadway where it intersects the south line of Gasconade street, thence south along the west line of Broadway four hundred and thirty and sixteen-hundredths feet (430.16'), thence north along the division line of City Blocks 2620 and 2621 to a point in the south line of Gasconade street distant two hundred and eighteen and one-hundredths (218.01) feet west of the west line of Broadway, thence east along the south line of Gasconade street two hundred and eighteen and one-hundredth (218.01) feet to the place of beginning;

That the said City of St. Louis, by virtue of its Charter and as recommended by its Board of Public Improvements of said city, passed a certain ordinance, being numbered 22,604 and entitled "An ordinance to improve Broadway between Neosho street and Osage street," which ordinance was duly approved by the Mayor of the City of St. Louis on October 18th, 1906, and which, among other matters, specified the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and that the cost thereof shall be levied and assessed as a special tax against all the property within a district defined and bounded by Section 14 of Article 6 of the Charter of the City of St. Louis;

That the City of St. Louis aforesaid, through said Board of Public Improvements, under and by virtue of said ordinance, contracted with the plaintiff, under contract numbered 7882, for the doing of said work and furnishing of the necessary materials;

That the plaintiff entered into the performance of said contract and has fully performed and completed said work in a skillful and workmanlike manner and in accordance with said contract and ordinance;

That the President of the Board of Public Improvements had charge of said work and did, when the same was fully com-
56 pleted, compute the cost thereof and assess it as a special tax against the property of said district as required by said Charter and said ordinance, in the ratio of one-fourth against the property fronting on said work in proportion to its frontage and three-fourths against the property in the district as defined by said Charter;

That the just proportion of the cost of said work, as aforesaid, and chargeable to the lot of ground above described is the sum of one thousand and twenty-one dollars and fifty-six cents ($1021.56)

according to its frontage, at the rate of two and thirty-seven thousand, four hundred and eighty-four hundred-thousandths dollars ($2.37484) per front foot, said lot having a front on said work of four hundred and thirty and sixteen-hundredths (430.16) feet, and seventeen hundred and twenty-three dollars and seventy-two cents ($1723.72) according to the area at the rate of four and twenty-seven thousand, seven hundred and twenty-one hundred-thousandths dollars ($4.27721) per one hundred square feet of area; or a total of twenty-seven hundred and forty-five dollars and twenty-eight cents ($2745.28); the items and particulars of which will appear by the tax bill herewith filed and made a part hereof and marked "Exhibit L."

That said President of the Board of Public Improvements on February 27, 1908, made out said tax bills and registered the same in his office in full and certified and delivered the same to the Comptroller of said City and took his receipt therefor, and said Comptroller registered and countersigned and delivered the same to plaintiff, who is still the owner thereof;

That said President of the Board of Public Improvements, in issuing said last mentioned tax bill, described the above mentioned property as follows, to-wit: Lot No. — in City Block No. 2620, said ground having an aggregate front of 430.16-369.71 feet, by a depth of 218.01 *point* feet, bounded north by Gasconade street, east by Broadway, south by Point and west by Withnell;

That by virtue of the premises and provisions of the Charter aforesaid said tax bill became and is a lien against the lot of ground above described;

That on March 2nd, 1908, plaintiff demanded the payment of said tax bill, which was refused and the same is still due and payable, and no part thereof has been paid;

Wherefore, plaintiff prays judgment in said sum of twenty-seven hundred and forty-five dollars and twenty-eight cents ($2,745.28) with eight (8) per cent interest thereon from March 2nd, 1908, and for costs of suit.

And on this day plaintiff filed the special tax bills referred to in said amended petition.

On May 26th, 1910, defendant filed a motion to strike out said amended petition because the same changed the cause of action.

57 On March 6th, 1911, said motion to strike out the amended petition was overruled.

On March 20th, 1911, defendant's term bill of exceptions to such action of the Court was allowed and filed.

On March 30th, 1911, defendant filed a general demurrer to the amended petition.

On September 11th, 1911, said demurrer was overruled.

On October 2nd, 1911, defendant filed an Answer to each of the twelve counts of said Amended Petition, the answer to each count therein being in words and figures as follows:

Answer to Amended Petition.

I. Now comes the defendant in the above entitled cause, and for an answer to the first count in said amended petition contained, denies each and every allegation thereof.

And for a further defense to said count this defendant alleges that plaintiff failed to file in the Comptroller's office of the City of St. Louis, the notice required by Sections 9848 and 9849 of the Revised Statutes of Missouri, 1909, within ten days after the original petition was filed in this case. That by reason of said failure said lien herein sought to be enforced has terminated.

And for a further defense to said count defendant alleges that the suit to foreclose the lien mentioned in the amended petition was not brought within two years from the date of the tax bill herein, and plaintiff's right to enforce same has terminated.

Wherefore defendant prays to be hence dismissed with his costs.

And for further answer to said first count, and by way of a cross-action, the defendant alleges that if it shall be held that the said cause of action on said tax bill has not been barred by failure to bring suit to enforce the lien within two years of the date of the tax bill, and has not been lost by failure to give the notice required by law, then this defendant alleges said tax bill is null and void and of no effect and as a reason therefor alleges:

1st, that the assessment and charge in said special tax bill against the property mentioned is invalid for the reason that the district in respect of which three-fourths of the cost of said improvement has been assessed against the area thereof, was not established according to the provisions of the Charter of the City of St. Louis, in the following particulars, to-wit: that the eastern boundary line of said district was not drawn midway between the next parallel or converging street throughout its entire length, but in some places much nearer to the street to be improved, thus unlawfully increasing the assessment against defendant's property.

58 2nd, that in said alleged district so erroneously laid out, there is located the Workhouse grounds, market places, and lots of ground belonging to the City of St. Louis, and the proportion of the cost of said improvement should be assessed against the property of the City, and eighty-six hundred and thirty-four dollars apportioned by the ordinance providing for said improvement is not the City's portion of said cost, but defendant alleges that by reason of the incorrect location of the district line through the Workhouse grounds the City's proportion is greatly lessened thereby, and the remainder of the assessment against other property is greatly increased thereby.

3rd, that said charge is in substantial excess of any possible benefit to defendant's property, and presents such peculiar and extraordinary hardships as amounts to actual confiscation of private property for public use, and constitutes taking property without due process of law, in violation of the 14th Amendment of the Constitution of the United States;

4th, that a large amount of real estate belonging to other persons and located with reference to the street to be improved similarly and of like proximity and value to defendant's property, is not assessed or included in any tax bill for any part of the cost of said improvement; that if said district is correctly defined, and in accordance with the provisions of Article 6, Section 14, of the Charter of said City, then said Section 14 of Article 6, of said Charter is void and unconstitutional for the reason that it violates Section 1, Article 14, of the Amendment of the Constitution of the United States, depriving the defendants of their property without due process of law, by denying to defendant the equal protection of the laws, by subjecting all defendant's property to the lien of said assessment and in not subjecting to said lien other land adjoining the street to be improved similar in location and value to defendant's; that said section of said Article is also unconstitutional for the reason that it violates said section of said article of the Amendment to the Constitution of the United States by denying to defendant the equal protection of the law, in this, that said Section 14, of said Article 6 of said Charter, operates to divide all property contiguous to the street to be improved into lots which have not been subdivided by the owners and to impose an arbitrary, unjust and unlawful assessment on property which has not been divided into lots; and that said Charter provisions also violate Sections 20 and 30 of Article 2, of the Constitution of the State of Missouri;

59 5th, that the provisions of the Charter of the City of St. Louis afford no opportunity to the landowner to be heard upon the establishment of the area district or upon whom the tax shall be levied, the amount of the benefits, the making of the assessment, or the apportionment thereof, and the said Charter provisions are violative of the 14th Amendment of the Constitution of the United States, in taking property without due process of law;

6th, from the beginning to the end of the proceedings under which said tax was levied the defendants were not afforded an opportunity to be heard upon the establishment of the district, the benefits derived, upon whom the tax should be levied, the making of the assessment, and its apportionment, and the enforcement of same, and will result in the taking of defendant's property without due process of law in violation of the said 14th Amendment to the Constitution of the United States;

Wherefore, the defendant prays that the Court may declare said special tax bill null, void and of no effect, and that plaintiff be forever enjoined and restrained from transferring or collecting said special tax bill and that the same be ordered cancelled and delivered into court by the plaintiff, and that the lien thereof on the defendant's said property be forever discharged, and for such further and general relief as to the Court may seem meet and proper.

On May 2nd, 1912, plaintiff filed to said answer an amended reply in words and figures as follows (caption and signature omitted):

Amended Reply.

And now comes the plaintiff and by leave of Court first had and obtained files this its amended reply to the answer to the amended petition filed herein and says:

First. That it denies each and every affirmative allegation in said answer contained.

Second. Further replying this plaintiff says that sections, pleaded in said answer respectively to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, viz.: 9848 and 9849 of the Revised Statutes of Missouri of 1909 are unconstitutional and null and void, and not applicable to the City of St. Louis or this case, for the following reasons:

A. They are in conflict with the Charter of the City of St. Louis.

B. The Legislature is without power or authority to pass laws changing the provisions of the Charter.

C. The tax bills were issued prior to the passage of such laws.

Wherefore plaintiff prays judgment as in its petition.

On November 2nd, 1912, there was entered of record, the following:

60 *Judgment.*

Now at this day this cause coming on for hearing, come the parties hereto by their respective attorneys, and waiving a jury submit this cause to the Court, upon the pleadings, the evidence, special tax bills and proof adduced; and the Court having heard and duly considered the same and being fully advised in the premises, doth find, that the defendant is not entitled to the affirmative relief, by way of cross-bill prayed for in the twelve counts of his amended answer, and doth further find in favor of plaintiff, on the issues joined, on the twelve counts of the amended petition as follows, to-wit:

Upon the first count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15409, which was duly issued by the City of St. Louis, under authority of the City Charter and Ordinance No. 22604, and Contract No. 7882 and is a first lien upon the property hereinafter described. That said special tax bill is for the sum of $244.55 (including interest to date) and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot 8 in City Block No. 2609, having an aggregate front of 25 feet on Broadway by a depth of 120 feet, bounded north by Withnell, east by alley, south by Mayer and west by Broadway:

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the first count of the amended answer, by way of cross bill and that plaintiff go hence without day as to said first count.

The Court doth further consider and adjudge that the plaintiff

is entitled to recover the sum of $244.55 with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the second count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner of special tax bill No. 15410, which was duly issued by the City of St. Louis, under authority of City Charter and Ordinance No. 22604 and of Contract No. 7882 and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date) and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot seven (7) in City Block No. 2609, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell and west by Broadway.

61 It is therefore considered and adjudged by the Court, that the defendant take nothing by the affirmative relief prayed for in the second count of the amended answer, by way of cross bill, and that the plaintiff go hence without day as to said second count. The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per anum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the third count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15411 which was duly issued by the City of St. Louis, under authority of City Charter and of Ordinance No. 22604 and of Contract No. 7882, and is a first lien upon the property hereinafter described. That said special tax bill is for the sum of $244.55 (including interest to date) and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot six (6) in City Block No. 2609, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell and west by Broadway; It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the third count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said third count.

The Court doth further consider and adjudge, that the plaintiff

is entitled to recover the sum of $244.55, with interest thereon at the rate of six per cent per annum from this date, until paid, together with its costs herein expended to be levied out of the property above described and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the fourth count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15412, which was duly issued by
the City of St. Louis, under authority of the City Charter
62 and of Ordinance No. 22604, and of Contract No. 7882, and
is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date) and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot five (5) in City Block No. 2609, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell and west by Broadway.

It is therefore considered and adjudged by the Court, that the defendant take nothing by the affirmative relief prayed for in the fourth count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said fourth count; The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date until paid, together with its costs herein expended to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the fifth count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15413, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date) and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot four (4) in City Block No. 2609, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Zimmer, east by alley, south by Withnell and west by Broadway:

63 It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the fifth count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said fifth count. The

Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55 with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the sixth count of the plaintiff's amended petition the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15435, which was duly issued by the City of St. Louis under authority of City Charter and of Ordinance No. 22604 and of Contract No. 7882, and is a first lien upon the property hereinafter described. That said special tax bill is for the sum of $244.55 (including interest to date), and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot Seven (7) in City Block No. 2608, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty feet (120'), bounded north by Withnell, east by alley, south by Ost- and west by Broadway.

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the sixth count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said sixth count.

The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property hereinafter described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the seventh count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15437, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date), and that said
64 sum, together with the costs of this suit are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot 9 in City Block No. 2608, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell, and west by Broadway.

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the seventh count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said seventh count.

The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the eighth count of the plaintiff's amended petition, the Court doth find that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15438, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described. That said special tax bill is for the sum of $244.55 (including interest to date), and that said sum, together with the costs of this suit are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot 10 in City Block No. 2608, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell, and west by Broadway.

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the eighth count of the amended answer by way of cross bill, and that the plaintiff go hence without day, as to said eighth count; the Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

65 And upon the ninth count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a certain special tax bill No. 15439, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date), and that said sum, together with the costs of this suit are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot 11 in City Block No. 2608, said ground having an aggregate front of twenty-five (25) feet by a depth of one hundred and twenty (120) feet, bounded north by Osage street, east by alley, south by Withnell, and west by Broadway.

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the ninth count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said ninth count. The Court

doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the tenth count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a special tax bill No. 15512, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $4,035.01 (including interest to date), and that said sum, together with the costs of this suit are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: a certain lot of ground in the City of St. Louis and State of Missouri, in City Block No. 2621, beginning at a point where the west line of Broadway intersects the north
66 line of Meramec street, thence west along the north line of Meramec street seventy-four and fifty-five hundredths feet (74.55'), thence northwardly six hundred and twenty-five and twenty-six one-hundredths (625.26) feet to a point in the south line of Gasconade street, distant two hundred and fifty-two and thirty hundredths (252.30) feet west of the west line of Broadway, thence east along the south line of Gasconade street thirty-three and forty-nine hundredths (33.49) feet, thence south along the division line of City Blocks 2620 and 2621, three hundred and sixty-nine and twenty-one hundredths (369.21) feet to a point in the west line of Broadway, distant two hundred and sixty-eight and twenty hundredths (268.20) feet north of Meramec, thence south along the west line of Broadway, two hundred and sixty-eight and twenty hundredths (268.20) feet to the place of beginning.

It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the tenth count of the amended answer by way of cross bill, and that plaintiff go hence without day as to said tenth count.

The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $4,035.01, with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the eleventh count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a special tax bill No. 15513, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the prop-

erty hereinafter described; that said special tax bill is for the sum of $3,575.64 (including interest to date), and that said sum, together with the costs of this suit, are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: a lot in City Block 2620, beginning at a point in the west line of Broadway where it intersects the south line of Gasconade street, thence south along the west line of Broadway, four hundred and thirty and sixteen hundredths feet (430.16) thence north along the division line of City Blocks 2620 and 2621 to a point in the south line of Gasconade street, distant two hundred and eighteen and one hundredth (218.01) feet west of the west line of Broadway, thence east along the south line of Gasconade street, two hundred and eighteen and one hundredth (218.01) feet to the place of beginning.

67 It is therefore considered and adjudged by the Court that the defendant take nothing by the affirmative relief prayed for in the eleventh count of the amended answer by way of cross bill, and that the plaintiff go hence without day as to said eleventh count. The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $3,575.64, with interest thereon, at the rate of six per cent per annum from this date until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

And upon the twelfth count of the plaintiff's amended petition, the Court finds that the plaintiff is the lawful owner and holder of a special tax bill No. 15436, which was duly issued by the City of St. Louis, under authority of the City Charter and of Ordinance No. 22604, and of Contract No. 7882, and is a first lien upon the property hereinafter described; that said special tax bill is for the sum of $244.55 (including interest to date), and that said sum, together with the costs of this suit are a special lien against the property of defendant, lying, being and situate in the City of St. Louis, Missouri, and described as follows, to-wit: Lot No. 8, in City Block No. 2608, said ground having an aggregate front of twenty-five (25) feet, by a depth of one hundred and twenty (120) feet, bounded north by Withnell, east by alley, south by Withnell, and west by Broadway. It is therefore considered and adjudged by the Court, that the defendant take nothing by the affirmative relief prayed for in the twelfth count of the amended answer by way of cross bill, and that plaintiff go hence without day as to said twelfth count.

The Court doth further consider and adjudge that the plaintiff is entitled to recover the sum of $244.55, with interest thereon, at the rate of six per cent per annum from this date, until paid, together with its costs herein expended, to be levied out of the property above described, and that this judgment shall be and constitute a special judgment against said tract of ground belonging to defendant, and that said land be sold to satisfy the same, and that special execution issue in conformity with this judgment.

Opinion filed.

On November 6th, 1912, defendant filed its motion for a new trial and its motion in arrest of judgment.

On January 17th, 1913, defendant's motions for a new trial and in arrest of judgment were both overruled.

68 On January 29th, 1913, defendant filed his affidavit of appeal, and appeal bond, which was fixed at $500.00, and approved, and an appeal allowed defendant to the Supreme Court of the State of Missouri, and defendant given sixty days' time beyond the expiration of the term to file his bill of exceptions.

And afterwards, on the second day of May, A. D. 1912, at the April Term, 1912, of said Court, the above-entitled cause came on to be heard before his Honor, William M. Kinsey, and the following proceedings were had therein:

Appearances: E. L. Gottschalk, Esq., for plaintiff; Messrs. E. T. & C. B. Allen, for defendant.

Mr. Gottschalk: If the Court please, plaintiff makes request at this time to file an amended reply.

The Court: You are offering to file an amended reply by leave?

Mr. Gottschalk: Yes, sir.

Mr. Allen: And we will object to it, your Honor, as there has been no notice given as is required by law.

69 The Court: Make your objections into the record.

Mr. Allen: We object to it, first, on the ground that the amended petition is such a departure from the original petition as to constitute a radically different cause of action—another cause of action—and second, that on the face of the pleadings it is shown that no notice as required by statute has been filed; third, that the district as laid out is not in accordance with the Charter provisions; fourth, that in this particular case the tax amounts to a confiscation of defendant's property to the extent that the tax is in excess of the benefits that the property derived from the improvement to the property.

The Court: What open question is there?

Mr. Allen: The improper laying out of the district.

The Court: Well, proceed.

To which action of the Court in permitting the amended reply to be filed defendant duly excepted.

The plaintiff to maintain the issues on its part then introduced the following evidence:

HERMAN RUECKING, being first duly sworn, on behalf of plaintiff, testified as follows:

Direct examination:

My name is Herman Ruecking, and I am president of the Ruecking Construction Company, and recognize the signature of A. J. O'Reilly, President of the Board of Public Improvements, on the twelve special tax bills; also recognize the signature of Taussig, the Comptroller; and the signature of Joseph T. Pasquier, the Assessor

of Special Taxes. That demand was made on these tax bills in the ordinary manner through the City Marshal, and not a cent has been received thereon.

Cross-examination waived.

Mr. Allen: Will you make any admission that the notice was not filed in accordance with the statute?

70 Mr. Gottschalk: I will only make this admission: That there was no notice filed with the Comptroller of the pendency of this suit prior to the 10th day of February, 1911.

The Court: The notice you refer to is that required by the Act of June 16, 1909?

Mr. Gottschalk: Yes, and the general Act which is, I think, Section 9848 of the Revised Statutes of 1909.

We now offer in evidence these twelve tax bills which have just been referred to by the witness.

Mr. Allen: We object to that, first, for the reason that it appears that the amended petition was not filed within two years of the date of the tax bills, and the lien, therefore, has lapsed. Second, it appears from the admission just made that no notice of this suit covering said tax bills has been filed in the Comptroller's office as required by law within ten days after the institution of this suit. Third, that the Charter provision under which the bill was issued was unconstitutional in this, that there was a division of the property without due process of law, and in this particular case the tax bills go beyond the limit set by the 14th amendment, and the amount of taxes is in excess of the benefits received, and amounts to a confiscation of private property.

The Court: We can let the record show that these tax bills are taken subject to objection.

Mr. Gottschalk: Yes, sir.

The Court: Then by consent of counsel, you agree to that, Mr. Allen?

Mr. Allen: We will have to abide by the ruling of the Court.

The Court: Then by consent of counsel the testimony, that is to say the tax bills will be admitted subject to the objection made by defendant, with the understanding that the Court will pass upon this matter.

Mr. Gottschalk: Plaintiff now offers in evidence notice and return of the City Marshal, George P. Weinbrenner, by A. P. Watkins, as deputy. I offer all twelve of them as one offer.

Mr. Allen: We object to the notices as being incompetent, and immaterial; incompetent because the return does not show that compliance has been had with the law relative to notice of special tax bills; immaterial for the reason that the tax bills themselves are null and void——

The Court: Is this objection only a reiteration of the general one?

Mr. Allen: I take it the notice of special tax bills necessarily must be served personally. There is no return of any personal service at all.

Mr. Gottschalk: The return was by leaving a copy at the place of abode. It says "they shall be served by teh City Marshal as in a civil action." I desire to state that the notice is here, and service on the notice was had on the second day of March, 1908.

71 Said tax bills are marked Plaintiff's Exhibits "A" to "M," inclusive, with the exception of "J"; the notices being attached to the respective bills.

These twelve tax bills are dated Feb. 27, 1908, and are in the usual form of instalment-payment tax bills. Exhibits A, B, C, D, E, F, G, H, I and M are for $187.69, each, differing only in the description of the property and the number of the tax bill; Exhibit K is for $3097.05, and is against unplatted ground in City Block 2621, bounded on the north by Gasconade street, east by Broadway, south by Meramec street, and west by boundary line of district; Exhibit L is for $2745.28, and is against unplatted ground in City Block No. 2620, bounded on the north by Gasconade street, on the east by Broadway, south by a point, and west by property of Withnell.

The twelve notices, being Exhibits N, O, P, Q, R, S, T, U, V, W, Y, Z, are each in words and figures as follows, except as to amounts and descriptions of the property:

"Special Tax Bill Notice.

William W. Withnell, Meramec St., Owner.

You are hereby notified that Special Tax Bill No. 15409 for $187.69, dated Feb. 27th, 1908, has been issued to Ruecking Construction Co., Contractors, under Ordinance No. 22604, Contract No. 7882, for work done on Broadway, Bet. Osage and Neosho and chargeable against property described in said Special Tax Bill as follows:

Lot No. 8 in City Block No. 2609, said ground having an aggregate front of 25 feet, by a depth of 120 feet, bounded North by — East by — South by — and West by —.

The bill is payable as provided by Section 25, Article VI. of the City Charter and the Chippewa Bank, No. 3801 South Broadway, St. Louis, Mo., has been designated as the place of payment thereof, where payment of the bill in full may be made without interest within thirty days after service of this notice; otherwise, in accordance with said Section and Article.

Payment thereof is now demanded.

RUECKING CONSTRUCTION CO.,
Contractors.

By —— ——.

Pay at Chippewa Bank, 3801 South Broadway."

A copy thereof was left at the usual place of abode of W. W. Withnell by the then City Marshal.

Defendant's Evidence.

LEO OSTHAUS, being duly sworn, testified as follows:

Direct examination by Mr. Allen:

My name is Leo Osthaus; I am Deputy Assessor Special Taxes, City of St. Louis. I have made a plat of the assessment district for the improvement of Broadway, between Neosho and Osage
72 streets; that is the plat of the district of these special tax bills, which we have here. The limit on the north is Osage street; on the South is Neosho street, according to the ordinance. Beginning at the South the Eastern district line is not drawn midway between Broadway and the River. It is drawn distant therefrom the average distance of the opposite boundary line from Broadway. The Western district line is distant from Broadway 134.69 feet. "On the other end of the subdivision it is only 120.16. There is a cut-off." The East district line is 172.54 feet away from Broadway.

You can't lay out a district block by block, for instance there are cut-offs and you have to take and get the average distance in order to get the entire contract. We found the average distance from tween Osceola Street and Chariton Street is distant from Broadway between Neosho and Dakota Street. The Eastern boundary line between Dakota and Wyandotte is 280 feet from Broadway, and between Wyandotte and Osceola the eastern district line is 280 feet away on Wyandotte and on Osceola, on account of the curve, it is 243.50 feet distant. The Western boundary line of the district between Dakota Street and Osceola Street is 297.5 distant on Osceola Street, and 298.5 on Dakota Street. The Eastern district line between Osceola Street and Chariton Street is distant from Broadway on Osceola Street 241.31 feet, and on Chariton Street 64.26 feet. Between these two streets the Western district line is distant from Broadway, on Osceola Street 16.08 feet, and on Chariton Street 192.65 feet. The Western district line between Chariton Street and Ohio Avenue is distant from Broadway on Chariton Street 45.06 feet, and at the intersection of Ohio Avenue is 139.90 feet.

The East half of City Block No. 2661-E is City property.
73 The Eastern boundary line between Chariton Street and Meramec Street is distant on Chariton Street 295 feet, and on Meramec Street 168.10 feet. The opposite district line is here distant from Broadway 56.5 feet, to point in City Block 2662, which is owned by the City.

City Blocks 2663 and 2664 are also owned by the City and used as the Work House, and are walled or fenced in, and Piedmont Street is cut off by wall, and the Boiler House stands right here.

The Eastern boundary line in City Block 2619 is triangular, and is distant from Broadway on Meramec Street 160.18 feet. The Western district line is distant from Broadway on Meramec street 74.55 feet and on Gasconade Street 251.50 feet. The Western district line between Gasconade Street and Osage Street is distant from

Broadway at Gasconade Street 267.82, and on Osage Street it is 282.46 feet away. The Eastern district line between Gasconade and Osage Streets is 285 feet away on both streets.

The plat was admitted in evidence and marked Defendant's Ex. No. 1-L.

(Here follows map marked p. 74.)

MAPS

TOO

LARGE

FOR

FILMING

This was all the evidence in the case.

On the 2nd day of November, A. D. 1912, at the October Term, 1912, of said court, the Court entered judgment for plaintiff on plaintiff's several causes of action, and against defendant on its several counter-claims, and filed the following memorandum:

No. 65063/7.

RUECKING CONSTRUCTION COMPANY,

v.

WITHNELL.

Memorandum.

The petition in this case is in twelve counts, in each of which the plaintiff seeks to enforce the lien of a special tax bill issued to it by the Board of Public Improvements of the City of St. Louis, in payment for public work, consisting of the reconstruction of Broadway between Neosho and Osage streets.

The answer to this petition is also in twelve counts, identical in character, and after pleading two special defenses, pleads certain matters by way of cross bill, by reason whereof the Court is asked to adjudge the special tax bills sued on to be null and void and of no effect, and that the plaintiff be enjoined and restrained from collecting the same, and that they be ordered canceled, and the lien thereof upon the defendant's property be forever discharged.

Before considering the sufficiency of plaintiff's petition and the evidence adduced in support thereof, and also the two special defenses pleaded to each count, an orderly determination of the controversy now submitted to the Court will be subserved by first considering the defendant's cross bill, because if the matters therein stated are well pleaded, and sustained, and the defendant is entitled to the affirmative relief which he seeks, then the remaining issues in the case become of no importance, and must necessarily be ruled against plaintiff.

Six separate grounds are alleged in the cross bill by reason whereof the defendant claims he is entitled to the affirmative relief prayed for. The first, second, and in part the fourth, relate to alleged defects in establishing the assessment district, to-wit, the failure to establish the same in accordance with the provisions of Section 14, Article 6, of the Charter of the City of St. Louis, and require an examination of the evidence in the case, while the other grounds challenge the constitutionality of the special assessment as laid, and raise questions of law only.

In disposing of these questions of law, it will suffice to say in this case that they have all passed under the scrutiny of the Appellate Courts of this State heretofore, and have been ruled against the defendant. As I understand the law, those questions are no longer open for determination in this case.

76 There is no evidence in the case from which any inference may be drawn that the amount of the several tax bills is confiscatory.

The assessment district must be laid out in conformity with Section 14, Article 6, of the Charter. A careful examination of the plat offered in evidence, and a comparison thereof with the requirements of said Section 14, demonstrates that the assessment district in this case substantially conforms to the requirements of said section, as construed by the Supreme Court in the Collier and Kaufmann cases reported in the 180th Missouri. It follows, therefore, that the defendant is not entitled to the affirmative relief which he prays.

The affirmative defenses are based first on the alleged fact that plaintiff did not institute this suit within two years after the tax bills became due and payable, and second, that it failed to comply with Sections 9848 and 9849, R. S. 1909, requiring that a written notice shall be lodged with the Comptroller within ten days after suit was instituted, setting forth when, and in which court such suit was filed. It is conceded that the plaintiff did not comply with these sections. I propose to first consider the second defense, both because of its importance, and of the difficulties inherent in the proposition. If the defendant's construction of the two sections of the statute referred to above is correct, and if they are applicable to the facts in this case, then the plaintiff's action must fail. The tax bills sued on were issued to the plaintiff on the 27th day of February, 1908. Sections 9848 and 9849 appear for the first time in the act of the State Legislature approved June 1, 1909, which went into effect on August 16, 1909, almost one year and a half after the tax bills in question became a lien on the defendant's property, and after the rights of plaintiff thereunder had accrued. There is nothing in the act of June 1, 1909, indicating that it was intended to have any retroactive force or effect. It is argued by defendant that this act affects the remedy only; that it is in the nature of an additional statute of limitations, and like all such acts it governs the procedure in this case, although the cause of action was in existence before its passage.

In passing upon a similar provision contained in the Charter of Kansas City, the Supreme Court in Haag v. Ward, 186 Mo. 344, l. c., said:

"So that, so far as the parties to the action were concerned, the proviso (requiring a notice like that now under consideration) related to something to be done after the matter had gotten into court, and prescribed a duty or act that was not essential to the prosecution of the action, and was not required to be done by

77 the general laws of the State as a part of the necessary procedure in the case."

In a former memorandum filed by the Court in this case, it is said that the lien of a special tax bill issued in payment for public work is sui generis. There is no personal liability thereon, and unless the land can be made to respond in payment for the improvements, the owner and holder of such bill has no other recourse whatever. Such

a lien is a vested right, and is within the protection of the constitution forbidding legislation the effect of which is to impair vested rights. Section 9848 as construed by defendant imposes upon the plaintiff in respect to its tax bills an additional duty or obligation which was not in existence when the bills were issued, and burdens the plaintiff's right with a penalty of forfeiture for failure to perform such act or duty, and thereby creates a new obligation which is no part of procedure under the general laws of the State. The above statement was followed by a quotation from Leete v. The State Bank of St. Louis, 115 Mo. 198, l. c., to this effect:

"Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed must be deemed retroactive."

The conclusion then reached was that, granting to the defendant the correctness of his construction of the Act of June 1, 1909, it could not be made applicable to the plaintiff's tax bills which had been issued to it more than a year prior to the passage of the Act. Upon further reflection I find no reason for receding from that position, especially in view of the fact that in Haag v. Ward, supra, the Supreme Court has said that the notice is no part of the procedure.

Assuming that the Act of June 1, 1909, does apply to this case, did the Legislature intend that a failure to give this notice should be available to the owner named in the tax bill as a defense to a suit thereon? There is no conceivable reason why this notice should be given for the benefit of the owner, because he must be notified otherwise by summons or other process of law. It is easy to understand why such notice should be required for the benefit of title examiners, or other persons who might desire to purchase the land from the owner, but, after calling to one's aid the established rules of construction, it is not at all an easy matter to determine what intention the legislature meant to express. A literal construction of the Act would lead to a forfeiture of the lien for failure to give the notice, although suit was instituted within a day after the bill became due. I think the decision of the Supreme Court in Haag v. Ward, supra, in construing a very similar statute, and in holding that the notice was not intended for the owner, and that failure to give it did not constitute an available defense, may be followed in this case.

78 The Charter of the City of St. Louis was granted under a special provision of the Constitution of this State. In respect to matters that are purely local, and of municipal concern only in which the State at large neither has nor can have any interest, the Charter is immune from amendment by act of the Legislature, and can only be amended according to its own provisions.

The opening, construction, and reconstruction of streets, and the manner and means by which public work of that character shall be paid for by the City of St. Louis, is a matter of local and municipal concern only, and has been delegated by the Constitution to the city, by its Charter. The defendant claims that the Act of June 1, 1909,

may be read into the Charter, and enforced as part thereof, although the Charter contains no provisions for a notice such as the one in question.

The Supreme Court has held, in the cases of Murnane v. the City of St. Louis, 123, Mo. 479, and the City of St. Louis v. Dorr, 145 Mo. 466, that it is not competent for the Legislature to amend the Charter of St. Louis in respect to a matter that is purely local and of municipal concern only. That provision of the Constitution under which the Charter was granted, and which requires that the Charter itself, and all ordinances passed in pursuance thereof shall always be in harmony with, and subject to the Constitution and laws of the State, does not warrant the Legislature in amending the Charter in respect to matters of local and municipal concern only, but does apply to those matters in respect to which the city performs the office of a county to the State.

The defendant is named as owner in the tax bills sued on in this case. The rights of third parties (if any exist) are not involved, and cannot be affected by this proceeding.

The defendant's second special defense must fail if (1) the Act of June 1, 1909, does not relate back to the tax bills sued on, and does not prescribe a new remedy only as contradistinguished to a new act or duty with which the plaintiff's lien is burdened, or his right changed, or (2) if it is not competent for the State's Legislature to amend Article 6 of the Charter of St. Louis in the manner claimed, or (3) if failure to perform the act or duty prescribed by said Act is not available to the owner as a defense, when sued on the tax bill.

79 Is it not necessary for the Court, in reaching this conclusion, to hold that said Act is void. It may well be held to be a constitutional amendment of legislative charters conferred by the general law relating to cities, towns and villages, or it may even be held to prescribe a notice of *lis pendens* applicable to all suits for the enforcement of special tax bills, whether issued under constitutional or legislative charters, as was decided in Haag v. Ward, supra, but still not available to the defendant as a defense in this case.

The first special defense rests on the plea of the statute of limitations. It has been assumed throughout the consideration of all the motions, demurrers and briefs heretofore filed and considered in this case, that the two-year limitation within which they were enforceable by suit expired on the 27th day of February, 1910. There is not a hint anywhere in the pleadings that these tax bills were made payable in seven installments, and that fact was first discovered by the Court on an examination of the bills themselves when the case was taken up for final disposition. True, in one line of a brief filed by plaintiff's counsel, there is a statement to the effect that if suit is filed within nine years after the date of the bills, the lien would be extended to the end of the litigation, but this statement did not attract attention at the time. While the evidence shows that the lien had not expired either at the times the original or the amended petitions were filed, the failure to allege that these

tax bills were payable in installments, injects another unnecessary question into this case. The Charter provides that such bills shall be made payable in installments of not less than three nor more than seven in number, and also provides that upon failure to pay any one or more of such installments, together with accrued interest on all, the holder may, at his option, elect to treat all of the installments as due, and recover on the entire bill. Where a tax bill is payable in installments, the limitation does not expire until after the lapse of two years from the date when the last installment becomes due.

The Kansas City Court of Appeals has so held in two cases. The St. Louis Court of Appeals has made a like ruling in Fruin v. Meredith, 145 M. A. 586. Does the mere fact of commencing suit on a tax bill payable in seven installments after one or two thereof are allowed to remain unpaid after they become payable, amount to the exercise by the holder of his right of option to treat all of the installments as being presently due and payable, though some of them are not so by their terms?

80 It is evident that plaintiff's counsel thought that the mere institution of this suit amounted to an exercise of his option, and that it was unnecessary to advise the Court that the tax bill was payable in installments by averments or to otherwise inform the Court. I know of no precedent that settles the question, but am of the opinion that the mere institution of this suit amounted to the exercise of plaintiff's option, and since the bills were payable in seven installments, none of the bills became wholly due at an earlier date than when the original petition was filed so as to set the statute of limitations running, and it would seem from the decisions of both the Kansas City and St. Louis Courts of Appeal that in a case like this the statute did not begin to run on the date when the suit was instituted. However that may be, it is perfectly clear from the evidence that neither at the time when the original petition was filed, nor at the time when the amended petition was filed was this action barred by the two-year limitation. Much of the argument put forth by defendant's counsel in support of his first special defense turns upon the proposition that the two-year limitation expires on February 27th, 1910, and since, as he argues, the original petition failed to state a cause of action, and none in fact was stated until the amended petition was filed, the plaintiff's action must fail because the bar of the statute intervened between the date of filing the original, and the date of filing the amended petition. All this argument must be brushed aside because it is based upon a premise that is not founded on fact.

The several causes of action sued on in this case arise upon liens created by the Charter of the City of St. Louis in favor of a contractor for public work, and are evidenced by the tax bills sued on. In a memorandum filed on March 6th, 1911, the question whether the amended petition is a departure from the original petition is considered. There are two or three discrepancies between the two petitions, but in each the same causes of action are sought to be enforced which are referred to above. In all of the counts of the

original petition the ordinance under which the work was done is alleged to have been passed in pursuance of the Charter of the City of St. Louis as amended October 22, 1901 (which is the present Charter), except one count, and it is apparent that the words "as amended October 22, 1901," were omitted from
81 that count by mere inadvertence, and could be supplied by amendment if necessary. The Court is still of the opinion that the amended petition is not a departure from the original.

From what has been said above, the affirmative relief asked by the defendant must be denied, and a judgment entered in favor of the plaintiff on the several counts of its petition as prayed, except as to interest. The several amounts for which judgment will be entered appear in a separate memorandum handed to the clerk.

W. M. KINSEY, *Judge.*

P. S.—Judgments are based on amount of principal and interest necessary to redeem tax bills on date thereof, and a memo. of calculations is filed herewith.

To the said action of the Court the defendant then and there duly excepted.

And during the same term of court, and within four days after the rendition of said judgment, to-wit, on the 6th day of November, 1912, the defendant filed its motion for a new trial, in words and figures as follows, to-wit (omitting caption and signature):

"Motion for a New Trial.

The defendant moves the Court to set aside the judgment heretofore rendered herein, and to grant defendant a new trial, for the following reasons, to-wit:

I. The judgment is not supported by any evidence, but is against the evidence;

II. The judgment is against the law;

III. The judgment is excessive;

IV. The Court erred in refusing to admit competent and material evidence offered by the defendant;

V. The Court erred in admitting incompetent and immaterial evidence offered by the plaintiff;

VI. The Court erred in not striking out the amended petition, because it attempted to state an entirely different cause of action from that stated in the original peition;

VII. The Court erred in overruling the demurrer to the reply to the answer to the amended petition;

VIII. The Court erred in not sustaining the demurrer to the amended petition;

IX. The Court erred in not entering judgment for the defendant, if the bills were payable as a whole, because the undisputed facts show that each count of said amended petition was barred by the statute of limitations;

82 X. The Court erred in entering a judgment for the plaintiff because if the bills mentioned in said counts were still payable in installments, the first installments of said bills were barred by the statute of limitations, and the third, fourth, fifth, sixth and seventh installments were not yet due and as to those the action was premature.

XI. The Court erred in concluding that the plaintiff was not required to comply with Sections 9848 and 9849 of the Revised Statutes of Missouri, 1909;

XII. The Court erred in finding that the taxing district was laid out in conformity with Section 14, of Article 6, of the Charter of the City of St. Louis, and as so defined was the basis of a constitutional tax to be assessed against defendant's property named in said amended petition.

XIII. The Court erred in rendering judgment enforcing said tax bills against defendant's property, when on the undisputed facts it was shown that at no stage of the proceedings for the assessment thereof, was a hearing accorded to the property owners, either on the question of the limits of the taxing district, or the apportionment of the tax, which resulted in unconstitutionally depriving defendant of his property without due process of law, and in denying to defendant the equal protection of the laws, as provided in the first section of the Fourteenth Amendment of the Constitution of the United States, and erred in not entering a judgment for the defendant on his equitable counter-claim;

XIV. The Court erred in entering a judgment enforcing said tax bills because it thereby deprived defendant of his property without due process of law, and denied him the equal protection of the law, as provided by the Constitution of the United States.

XV. The Court erred in rendering a judgment for the plaintiff when the undisputed facts show that property belonging to other persons similarly located to Broadway, and of like proximity and value as defendant's property, is not assessed or included in any tax bill, and Section Fourteen of Article Six of the Charter of said City of St. Louis, Missouri, is void and unconstitutional, and violated Section One of Article Fourteen of the Amendments to the Constitution of the United States, by denying to defendant the equal protection of the laws, by subjecting all defendant's property to the lien of said assessment, and in not subjecting to said lien other land adjoining Broadway, similar in location and value to defendant's, and the judgment should have been for defendant.

83 XVI. The Court erred in entering judgment for the plaintiff when the undisputed facts show that Section Fourteen of Article Six of said Charter operated to divide all property contiguous to the street to be improved into lots, which had not been subdivided by the owner, and to impose an arbitrary, unjust and unlawful assessment on property which had not been divided into lots, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States."

And thereafter, during the same term of court, and within four days after the rendition of said judgment, to-wit, on the 6th day of November, 1912, the defendant filed a motion in arrest of judgment, in words and figures as follows, to-wit (caption and signature omitted):

"Now comes the defendant in the above entitled cause, after the filing of a motion for a new trial, and moves the Court to arrest the judgment in this cause for the reason that upon the entire record the judgment is erroneous."

And thereafter, on January 17th, 1913, the Court overruled defendant's motion for a new trial, and defendant's motion in arrest of judgment, to which action of the Court in overruling said motion for a new trial and motion in arrest of judgment defendant then and there duly excepted.

Wherefore, time for filing Bill of Exceptions having been by order entered of record extended for sixty days after the December Term, 1912, of said court, the defendant tenders this, his Bill of Exceptions, and prays the Court that the same may be allowed, signed and filed and made part of the record herein, which is accordingly done.

Given under my hand and seal, this sixth day of March, A. D. 1913.

WILSON A. TAYLOR, [SEAL.]
Judge of the Circuit Court, Div. No. 7, at Time Bill is Filed.

W. M. KINSEY, [SEAL.]
Judge of the Circuit Court, Who Tried the Cause.

Thereafter, on the 15th day of March, 1913, there was filed in the office of the clerk of the Supreme Court of Missouri a certified copy of said judgment, and the order allowing an appeal to said court.

84 & 85 *Transcript of the Record.*

Supreme Court of the United States, October Term, 1917.

WILLIAM W. WITHNELL, Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY, Defendant in Error.

In Error to the Supreme Court of Missouri.

UNITED STATES OF AMERICA, *ss:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein William W. Withnell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri, this 12th day of February, in the year of our Lord one thousand nine hundred and seventeen.

W. W. GRAVES,
Chief Justice of the Supreme Court of the State of Missouri.

I hereby acknowledge service of a true copy of the within citation this 13th day of Feb'y, A. D. 1917.

RUECKING CONSTRUCTION COMPANY,
B. SCHNURMACHER,
THEODORE RASSIEUR,
By GEO. M. BLOCK,
Its Attorneys.

17544. William W. Withnell, Plaintiff in Error, vs. Ruecking Construction Co., Defendant in Error. Citation. Filed Feb. 12, 1917. J. D. Allen, Clerk.

86 STATE OF MISSOURI,
City of Jefferson, ss:

I, Jacob D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in Case No. 17544, of Ruecking Construction Company v. William W. Withnell, as fully as the same remains on file and of record in said case in my office; and that the original citation and writ of error are hereto attached and herewith returned.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of Missouri, in the City of Jefferson, in the State of Missouri, this 21 day of February, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*

Endorsed on cover: File No. 25,790. Missouri Supreme Court. Term No. 960. William W. Withnell, plaintiff in error, vs. Ruecking Construction Company. Filed February 28th, 1917. File No. 25,790.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM W. WITHNELL,
Plaintiff in Error,

vs.

RUECKING CONSTRUCTION COMPANY,
Defendant in Error.

No. 960.

In Error to the Supreme Court of Missouri.

STATEMENT

This suit was instituted in the Circuit Court of the City of St. Louis, State of Missouri, by the Ruecking Construction Company, a corporation, paving contractor, against William W. Withnell, owner of lots of land fronting on Broadway, in said city, to enforce the lien of twelve special tax bills, dated February 27th, 1908, ten of which are for the sum of $187.69, and are directed against lots numbered 4, 5, 6, 7, and 8, in City Block

No. 2609, and lots numbered 7, 8, 9, 10 and 11, in City Block No. 2608; one is for $3,097.05, against unplatted property in City Block No. 2621; and one is for $2,745.28, against unplatted property in City Block No. 2620, for the paving of Broadway (see plat hereto annexed).

The defendant, in the trial court, filed an Answer, and an Equitable Counter-claim, in which it sought to have the tax bills declared void, and the lien thereof discharged, for the following reasons: first, that the taxing district had been improperly laid out, and thus unlawfully increased the assessment against defendant's property; second, that by the incorrect location of the district, as to the Work House property, the city's proportion of the cost of the improvement was greatly lessened, and the assessment against the remainder of the property in the district was greatly increased; third, that the assessment is in substantial excess of any possible benefits to the defendant's property and is in violation of the Fourteenth Amendment of the Federal Constitution; fourth, that a large amount of real estate belonging to other persons similarly situated with reference to the street improved, and of like proximity and value to that of defendant's property, was not assessed or included in any tax-bill for any part of said improvement, thereby depriving defendant of his property without due process of law, and denying to him the equal protection of the law by subjecting his property to the lien of said assessment and relieving the property of others similar in location and value to that of defendant from said lien; fifth, imposing an arbitrary and unjust and unlawful assessment upon property which had not been divided into lots,

in violation of the Fourteenth Amendment of the Federal Constitution; and sixth, in not affording defendant an opportunity to be heard as to the establishment of the district, the benefits derived, upon whom the tax should be levied, the making of the assessment and its apportionment, and the enforcement of same, which resulted in the taking of defendant's property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

The trial court found for the plaintiff on its original cause of action and also on defendant's Equitable Counter-claim. In so doing, it said:

> "Six separate grounds are alleged in the cross-bill, by reason whereof defendant claims he is entitled to the affirmative relief prayed for.
>
> The first, second and in part the fourth, relate to the alleged defects in the establishment of the assessment district, to-wit, the failure to establish the same in accordance with the provisions of Sec. 14, Art. VI. of the Charter of the City of St. Louis, and require an examination of the evidence in the case, while the other grounds challenge the constitutionality of the special assessment as laid, and raise questions of law only.
>
> In disposing of these questions of law, it will suffice to say in this case that they have all passed under the scrutiny of the Appellate Courts of this State heretofore, and have been ruled against the defendant. **As I understand the law, those questions are no longer open for determination in this case.**"

Thereafter the defendant appealed the case to the Supreme Court of Missouri, which, by Division No. 2 thereof, declared the tax-bill unconstitutional, and quashed same. In so doing it said:

> "We think the rule above announced by the

United States Supreme Court is directly in point in the case at bar and that, therefore, the same must now be followed. The boundary lines of the benefit district in the present case varied in distance from the improved street from less than one inch at the closest point to 298.5 feet at the most distant point. Land was included or excluded from the benefit district, not because of benefit or lack of benefit to be derived from the improvement made but rather 'in blind obedience to a rule that required the result.' The ordinance in the Gast case having been held bad, it necessarily follows that the present ordinance must meet a like fate.

The judgment is, therefore, reversed."

Thereupon the plaintiff moved to transfer the cause to the Court *en banc*, and for grounds of this motion, it was stated:

"That the opinion heretofore rendered by division No. 2 in said cause is based upon, and involves, a constitutional question arising under the Constitution of the United States, and is based upon an interpretation of the Constitution of the United States adverse to respondent, and that under such circumstances, under Section 4 of Article VI. of the Constitution of the State of Missouri, Amendment of 1890, respondent is entitled, as a matter of right, to have said cause transferred to the court *en banc*."

Said motion was sustained, and the Court, *en banc* considered the case and affirmed the judgment of the trial court (Ruecking Construction Co. v. Withnell, 269 Mo. 546), saying:

"In short, the ruling in the Gast case considered and determined only the fact then before the court, and did not assume to determine where a special

> assessment was levied in conformity with the charter provision and with a proper regard for the rights of the property owners, that such assessment would be held invalid. There is, therefore, under this ruling no authority for the contention that the levy of the special assessments in the case at bar was violative of the Federal Constitution. In view of all of which we are of the opinion that the defendant is not entitled to the affirmative relief for which he prays."

Whereupon this Writ of Error was prosecuted to this Court.

The paving was done under an ordinance of the City. The total cost of the improvement was by the ordinance required to be, and was in fact, levied and assessed as a special tax in accordance with Section 14, Article VI. of the Charter, which provides that one-fourth of such cost shall be levied and assessed upon all property fronting upon or adjoining the improvement, according to the frontage on the improvement, and three-fourths of such cost shall be levied and assessed according to the area, upon all property in the district ascertained as thereinafter stated. The method for ascertaining such benefit district is defined by said Charter (Sec. 14, Art. VI.), as follows:

> "A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided; viz., if the property adjoining the street to be improved is divided into lots, the district line shall be so drawn so as to include the entire depth of all lots fronting on the street to be improved * * * if there is no parallel or converging street on either side of the street to be improved, the district line

> shall be drawn 300 feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved, and at an average distance of the opposite district line so fixed and located."

The plat in evidence (Trans., opposite p. 46) and attached hereto shows the boundary lines of the district. An examination thereof will reveal that the district line at the nearest point to the street to be improved is less than an inch, and at the most remote point is distant 297 feet. Because of such variances of the district line from the improvement made necessary by the ordinance, a large area situated with respect to the improvement similar to defendant's property, included in the benefit, is omitted from the benefit district, and as a result defendant's property is thereby more heavily taxed.

This peculiar situation is due to the irregularity and curving of Broadway and the varying distances therefrom of converging and parallel streets.

The only provision for an opportunity for the taxpayer to be heard upon the validity and the amount of the assessment is contained in Sec. 14 of Article VI. of the Charter, which is follows:

> "No ordinance for the construction or reconstruction of any street, avenue, boulevard, alley or public highway of the city, shall be passed unless recommended by the board of public improvements, as hereinafter provided. The board shall designate a day on which they will hold a public meeting to consider the improvement of any des-

MAPS

TOO

LARGE

FOR

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ignated streets, avenues, boulevards, alleys or public highways by grading or regrading, by constructing, or reconstructing, by paving or repaving the roadway, including cross-walks and intersections, and shall give two weeks' public notice, in the papers doing the city printing, of the time, place and matter to be considered, stating in such notice the kind of material and manner of construction proposed to be used for the wearing surface of such improvement, naming more than one kind of material or manner of construction, if the board deems it advisable so to do, and also the class of specification and plan for such work, which specification and plan shall be approved by said board, and filed in its office. If within fifteen days after such public meeting, the owners of the major part of the area of the land made taxable by this article for such improvement, shall file in the office of the board of public improvements their written remonstrance against the proposed improvement, or against the material or manner thereof, the board shall consider such remonstrance, and if said board shall, by a two-thirds vote, at a regular meeting, approve of the improvement, material or manner remonstrated against, they shall cause an ordinance for the same to be prepared and report the same with the reasons for their action and the remonstrance to the assembly. If such majority fail to remonstrate within fifteen days or shall petition the board for the improvement, said board may by a majority vote approve the same, and shall cause an ordinance to be prepared and reported to the assembly therefor."

No other opportunity to be heard upon the validity and extent of the tax is provided by the ordinance. Nor by the general laws of the state applicable to the City of St. Louis, nor by the Constitution of the State of Missouri.

No opportunity is afforded the landowner in the courts of Missouri to defend against the enforcement of lien when sued upon the ground that his property is not benefited or as to the amount of the benefit, or that the tax is invalid, as is shown by the cases of Meier v. City, 180 Mo. 391, and Houck v. Drainage District, 248 Mo. 383.

ASSIGNMENT OF ERRORS.

I. The Supreme Court of Missouri erred in holding that the application by the ordinance in question of the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis, did not take the plaintiff's in error property without due process of law, contrary to the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States;

II. The Supreme Court of Missouri erred in holding that the application by the ordinance in question of the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis, did not deny to plaintiff in error, the equal protection of the law:

III. The Supreme Court of the State of Missouri erred in holding in this case that the provisions of Section 14 of Article VI. of the Charter of the City of St. Louis was constitutionally applied to the plaintiff's in error property, when it is apparent from the record that the area assessment against plaintiff's in error property was not based upon the special benefits accruing to it from the improvement, but it was fixed in blind obedience to an arbitrary method provided by the Charter, which resulted (a) in a greatly disportionate burden upon the plaintiff in error, because the property of others similarly located and of like proximity and value to the street to be improved was not assessed; and (b) thereby denying plaintiff in error the equal protection of the laws, and in taking his property without due process of law.

IV. The Supreme Court of Missouri erred in hold-

ing that a special assessment district laid out by the ordinance in pursuance of the provisions of Section 14, Article VI. of the Charter of the City of St. Louis, with irregular boundary lines, which was not at a substantially uniform distance from the street to be improved when such irregularity was not due to any difference in the special benefits to plaintiff's in error property, did not provide for the taking of property without due process of law, and did not deny to such property holder the equal protection of the laws, contrary to the provisions of Section one of the Fourteenth Amendment to the Constitution of the United States.

V. The Supreme Court of Missouri erred in holding that the ordinance in question and Section 14 of Article VI. of the Charter of the City of St. Louis, provided for a hearing to the plaintiff in error as to the amount of his assessment, and upon all questions properly entering into that determination, and in holding that the tax proceeding in question did not thereby take the plaintiff's in error property without due process of law.

BRIEF.

I.

An ordinance providing for the apportionment of the cost of an improvement, must, in order to be valid, provide for the apportionment by some rule capable of producing reasonable equality between the parties assessed, and a fair distribution of the taxes proportionately to the benefits received.

Gast v. Schneider Granite Co., 240 U. S. 55;
Myles Salt Co. v. Board of Commissioners, 239 U. S. 478;
Wagner v. Leser, 239 U. S. 207;
St. L. & K. C. L. Co. v. Kansas City, 241 U. S. 419;
Houck v. Little River Drainage Dist., 239 U. S. 254;
Martin v. District of Columbia, 205 U. S. 139;
Raymond v. Traction Co., 207 U. S. 20.

II.

The ordinance in this case is invalid because the rule it applied to defendant's property for the enforcement of the cost of the improvements did not produce reasonable equality between the parties assessed, and was not based upon the idea of benefits, equality and justice. The same tax was levied on property 297 feet away from the street to be improved, as was levied upon property within a foot of the street to be improved.

Gast v. Schneider Granite Co., 240 U. S. 55;
Norfolk Co. Water Co. v. Norfolk, 246 Fed. 652;
Norris v. Montezuma Valley Irr. Dist., 248 Fed. 372;
Bush v. Branson, 248 Fed. 380;
Dietz v. City of Neenah, 91 Wis. 422;
White v. Gove, 183 Mass 333.

III.

The ordinance is void because it applied a vicious, arbitrary, and unjust rule to the defendant's property, and its application thereto results in gross inequality and injustice, and practical confiscation.

(Cases cited in previous paragraphs.)

IV.

The City of St. Louis is a political subdivision of the State of Missouri.

Northcut v. Eager, 132 Mo. 265;
Steffen v. St. Louis, 135 Mo. 44;
Straub v. St. Louis, 175 Mo. 413.

V.

There was no opportunity afforded defendant to be heard upon the validity of the tax, and the amount of the assessment.

Collier Estate v. Western Paving Co., 180 Mo. 375;
Meier v. City, 180 Mo. 391;
Houck v. Drainage Dist., 248 Mo. 373.

VI.

The landowner must have an opportunity to be heard as to the validity and apportionment of a special assessment for local improvements, **before it becomes a lien on his property. "The law itself must save the parties' rights, and not leave them to the discretion of the Court as such" in a suit to enforce the lien.**

Security Trust Co. v. Lexington, 203 U. S. 323;
Coe v. Armour Fertilizer Works, 237 U. S. 413;
Londoner v. Denver, 210 U. S. 373;
St. L. & K. C. Land Co. v. Kansas City, 241 U. S. 419;
Embree v. Road Dist., 240 U. S. 242;
Roller v. Holly, 176 U. S. 398;
L. & N. v. Central Stock Yards Co., 212 U. S. 132;
Fallbrook v. Bradley, 164 U. S. 112;
State v. Colbert, (Mo.) 201 S. W. 52;
City of Sandersville v. Bell, 146 Ga. 737; 92 S. E. 218;
Bouslog v. City of Gulfport (Miss.), 72 So. 899;
Violet v. Alexander, 92 Va. 561;
Stuart v. Palmer, 74 N. Y. 183.

ARGUMENT.

I.

The Instant Ordinance Void.

The ordinance in the Gast case (240 U. S. 55) and the ordinance in the case at bar have to do with the improvement of the same street, Broadway. In the Gast case, the improvement was of Northern Broadway, and in the instant case the improvement of South Broadway. The ordinances with that exception are precisely the same. As alleged in the petition in this case, the cost thereof "shall be levied and assessed as a special tax against **all the property within a district defined and bounded by Section 14 of Article 6 of the Charter of the City of St. Louis.**" Trans. p. 28

That the district lines are automatically fixed by the Charter, and that the ordinance could not add to or take from the benefit district has been repeatedly decided by the Supreme Court of Missouri. Fleming case, 251 Mo. 210; Collier case, 180 Mo. 375; State *ex rel.* Paving Co. v. St. Louis, 183 Mo. 230. See Sec. 14, Art VI, Charter of St. Louis, 1912. There is consequently here no legislative determination by the Municipal Assembly of the City of St. Louis, that the property taxed is benefited by the improvement. It consequently follows under the decision of this Court in the Gast case that the ordinance is void. The assessment district was laid out in blind obedience to the mandate of the charter. This resulted, if the district was correctly laid out in conformity therewith as plaintiff claims, in the following irregularities, and

gross lack of uniformity in the boundaries of the district.

The western boundary line of the district was distant from Broadway on the north line of Neosho street 120 feet; on the south line of Dakota street 134 feet; and immediately across the street, on the north line of Dakota street 290 feet; on the south line of Osceola street, 297 feet; on the north line of Osceola street sixteen feet; on the south line of Chariton street 192 feet; on the north of Chariton street 45 feet; at the intersection of Ohio avenue, on the south side of the street, 139 feet; on the north side, less than an inch; on the south line of Meramec street 56 feet; on the north line of Meramec street 74 feet; on the south line of Gasconade street 251 feet; on the north line of Gasconade street, 267 feet, and on the south line of Osage street 282 feet from Broadway. **Trans.p.45**

The same discrepancies and irregularities appear in the eastern boundary line of said district: On the north line of Neosho street the eastern district line is 172 feet from Broadway; on the South line of Dakota street 172 feet and on the north line of Dakota street, 280 feet; on the south line of Osceola 243 and the north line of Osceola street, 241 feet; on the south line of Chariton street 64 feet; on the north line of Chariton street 31 feet; on the South line of Meramec street 168 feet; on the north line of Meramec street 160 feet; on the south line of Gasconade street the eastern district line is less than one foot; on the north line of Gasconade street 285 feet, and on the south line of Osage street 285 feet from Broadway. **Trans.p.45**

As was said by this Court in the Gast case, "**the differences were not based upon any consideration of**

the difference of the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied.'' It should be remembered that under this ordinance the assessment is by mere superficial area, and the total cost of the improvement is imposed upon all property in the district. There can be no reason why all property occupying the same relative position with respect to the improved street should not be taxed alike, and it is obvious that if some of the property is taxed, while other property in the same situation is not taxed, that the property that is taxed is made to assume an unjust proportion of the burden; and if the property which is omitted is not benefited, then the taxed property in the same situation is not benefited.

An examination of the plat in evidence will reveal that the result of the ordinance is as the Supreme Court said in the Gast case, ''a farrago of irrational irregularities.'' **Trans.p.46**

In City Block 2717, if the property is benefited as far back in that block as in the block immediately across the street, to the north, then there has been omitted from the district approximately 117,215 square feet in this block alone. Immediately across the street to the east from this block, in Blocks 2715 and 2716, if the district line had been drawn as far away from Broadway as in the blocks immediately north, there would have been included within the district 102,340 square feet. Following the same procedure throughout the district will reveal thousands of square feet benefited, if defendant's property is benefited, not included within the district. If such property is not benefited, then defendant's is not.

In City Blocks 2608 and 2609, the district line is drawn 285 feet from the street to be improved, and includes defendant's property to a depth of 120 feet; whereas, immediately across the street in City Block 2619, some property is assessed to a depth of less than an inch, and in City Block 2662, the greatest depth is only 56 feet, and recedes to less than one inch. Again, defendant's property in Block 2620 is assessed to a depth of 251 feet, while immediately across the street property is assessed to a depth of less than one inch; in City Block 2661, to a depth of less than an inch; and in City Block 2661 west, to a depth of 139 feet, gradually receding until the property is only assessed at a depth of 45 feet; in City Block 2671, some of the property is assessed to a depth of only 64 feet, and in City Block 2674 to a depth only of 16 feet. The differences in the depth of the land assessed is not due to any differences in benefits, but simply to the existence of converging streets under the arbitrary rule which requires that result.

In City Block Nos. 2608 and 2609 defendant's property is subdivided and platted and is assessed to a depth of 120 feet and immediately across Gasconade street the property of others is assessed to a depth of less than one foot. The City of St. Louis owns the property in City Blocks No. 2662, 2661-E, and the unsubdivided part of City Block No. 2661-W. The greatest depth the city's property is assessed in Block 2662 is 56 feet, which gradually recedes until it is assessed for less than an inch. City property in City Block 2661-E is at its deepest part assessed to a depth of 31 feet and at its smallest depth less than an inch. If the city's property is not benefited beyond a line drawn from a point to 31 feet, or from a point to a

depth of 55 feet, then defendant's property is not benefited beyond a similar depth. **Trans.p.45**

The city also owns all the property in City Blocks 2663 and 2664, and with 2661-E is used as a municipal penal institution called the "Workhouse," and the property in all these city blocks is enclosed by a high fence or wall to prevent the escape of prisoners. There is in fact no street separating city blocks 2661-E from City Block 2663. Yet all the property of the city in Block 2663, each of 2661-E, and along the north line of Chariton street, approximately 70,000 square feet, is relieved of the tax. This is certainly subjecting defendant's property in City Blocks 2608 and 2609 to the inequities that have no justification in law. **Trans.p.45**

The defendant's property in City Blocks 2620 and 2621 is not platted or subdivided. On Gasconade street, defendant's property in City Block 2620 is assessed to a depth of 251.50 feet while the property directly across the street is assessed to a depth of less than an inch, and the greatest depth assessed is only 160 feet. It is respectfully submitted that there is no justification in law for these inequities.

The Court will take judicial notice, and the plat in evidence shows, that the average depths of the lots in St. Louis and in this vicinity is 120 feet. If defendant's property was subdivided into lots, the lots in City Block 2620 on Broadway would probably not have exceeded that depth; and the remainder of the depth beyond 120 feet would have been subdivided so that the lots would front on Gasconade, and under the ruling in the Gast case would not be assessable for the improvement of Broadway.

A glance at the plat will reveal that defendant's property in City Block 2621, at the corner of Broadway and Meramec street, has a depth on Meramec street of only 140 feet between Broadway and Ohio avenue, and that in subdividing this portion of this block the logical front would be on Meramec street, the probable subdivision would be a lot of 32½ feet width at the corner of Ohio avenue and Broadway, with three intervening lots of 25 feet each. If such was the subdivision, and it was adopted by other property owners on Osage, Gasconade, Meramec, Chariton, Osceola, Wyandotte and Dakota streets (see plat), the only portion of defendant's property on Meramec street and Broadway subject to the assessment would be 32½ feet.

The fact that the property of others (see plat) is improperly taxed thereby lessening the amount defendant is required to pay, does not validate an unlawful assessment against his property. Two wrongs cannot make a right.

These unconscionable results were not due to any considerations of difference in the benefits conferred upon one lot or another in said district, but were the result of the automatic application of a general rule for the creation of area districts applicable to thousands of different situations, no two of them alike, over which the tax is apportioned, without any reference to special benefits resulting from the improvement. Schneider Granite Co. v. Gast, 259 Mo. 167; Paving Co. v. Fleming, 251 Mo. 210; State *ex rel.* v. St. Louis, 183 Mo. 230.

The ordinance of the City of St. Louis, imposing the tax, provided:

> "The total cost of the foregoing work, and all proper connections and intersections required * * * shall be ascertained and be levied and assessed as a special tax upon all property within a district defined and bounded by Section Fourteen, of Article Six of the Charter of the City of St. Louis."

The ordinance in the Gast case defining the district was in exactly the same words as the ordinance in the instant case. The Charter provisions were the same. The unequal results are the same. In that case the Court said:

> "The ordinance, following the Charter, so construed, established a line determining the proportions in which the tax was to be borne, that, after running not a hundred feet from the street it leaps to near five hundred feet when it encounters such a tract and on the opposite side of the street was 150 to 240 feet away. The differences were not based upon any consideration of difference in benefits conferred, but were established mechanically in obedience to the criteria the charter directed to be applied. The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter **is bad upon its face as distributing a local tax in grossly unequal proportions not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result.**"

The ordinance in the instant case must also under that decision be void on its face.

II.

This Ordinance Made an Unconstitutional Application of the Charter Provision to Defendant's Property.

This ordinance is unconstitutional because it followed the charter, which provides that:

> "The total cost * * * shall be ascertained, and one-fourth thereof shall be levied and assessed upon all property fronting upon or adjoining the improvement, in the proportion that the frontage of each lot so fronting or adjoining bears to the total aggregate frontage of all lots or parcels of ground fronting upon or adjoining the improvement, and the remaining three-fourths of the cost so ascertained shall be levied and assessed as a special tax upon all property in the district to be defined and bounded as hereinafter provided, in the proportion that the area of each lot or parcel of ground, or the parts of such parcels of ground, lying within the district, bears to the total area of the district, exclusive of the streets and alleys."

Thereafter the charter provides the district shall be laid out as follows: "A line shall be drawn midway between the street to be improved, the next parallel or converging street on either side of the street improved, which line shall be the boundary line of the district."

This ordinance shows on its face that it entirely disregards the relation of benefits to the tax assessed. As was said of this rule of assessment by this Court in the **Gast case**, the difference in the amount of taxes assessed against the various lots in the district "are not based upon any consideration of the differences in the benefits conferred, but were established me-

chanically in obedience to the criteria that the charter directed to be applied."

This Court said, in the **Gast case**, of this method:

> "It was not a rule that as a whole and on the average might be expected to work well," and that it "distributed a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that required the result, and it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts."

The assessment is here made under a rule which absolutely excluded any inquiry as to special benefits, and is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power. It is described in the Gast case, by this Court, as "a farrago of irrational irregularities throughout."

When the charter provisions were adopted a portion of St. Louis had already been laid out in blocks and squares by streets running at right angles to one another. Almost all of this portion of the city was already paved. But the newer portions of the city were unpaved when the charter provisions were adopted, and the streets were not yet laid out, nor did they conform to the square or block type. A street might be improved where, as to a portion of the length of the improvement the next parallel street was 100 feet away, and for the rest of the length of the improvement 5000 feet away, and on the opposite side, the next street

might be seven hundred feet away for a part of the length of the improvement and 200 feet away for the rest of the distance. There was, therefore, in that portion of the city where paving was to be done no reasonable presumption that by this rule of taxation substantial justice would be done. But on the contrary the probability was great that the landowners would be taxed disproportionately to each other and to the benefits conferred, and some might be taxed for only one street, and others for ten streets.

If the ordinance violates the requirements of approximate equality in the apportionment of special taxes it is unconstitutional, and if it is unconstitutional it cannot give rise to valid taxation.

In **Dietz v. City of Neeneh**, 91 Wis. 422, it was said:

> "Where a special assessment is void because the law under which the proceedings were had is unconstitutional and void, it need not be shown to be inequitable in order to have its collection restrained."

In **White v. Gove**, 183 Mass. 333, *l. c.* 337, 338, it is said:

> "**It is contended that the statute now in question, though unconstitutional in cases like those before the Court when it was formerly considered, is constitutional when applied to cases like the present. This contention is not well founded. It was held unconstitutional in those cases because it was of general application to sewers to be constructed in all parts of Boston, through streets or private lands, and it was apparent that cases would arise in the general application of it in which, if it was carried out, it would produce disproportional and unreasonable taxation.** In Dexter v. Boston,

ubi supra, the Court said: 'In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to the cases, which may be expected to arise."

In the same opinion, on page 336, it was said:

"On the other hand it was held in Weed v. Mayor and Alderman of Boston, and in Dexter v. Boston, *ubi supra*, that such a method was not a proportional or reasonable way of determining benefits for the construction of sewers to be built through streets or private lands in all parts of Boston. This was so held because cases might be expected to arise under the statute in which such a method would work great injustice and the two cases referred to were illustrations of the fact that taxation under the statute would be far from proportional or reasonable."

In **Norfolk County Water Co. v. Norfolk**, 246 Fed., *l. c.* 652, it is said:

"The state may create tax districts and apportion the burdens of taxation, though unequal, without violation of the Fourteenth Amendment, unless the apportionment is palpably arbitrary and a plain abuse. Houck v. Little River Drainage District 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266. **But a scheme of taxation which subjects without reason owners of property having greater depth than that adjoining to greater and disportionate taxation is unconstitutional. Gast Realty, Etc., Co. v. Schneider, Etc., Co., 240 U. S. 55, 36 Sup. Ct. 254, 255, 60 L. Ed. 523.**" (Blackfaced type ours.)

In **Norris v. Montezuma Valley Irr. District,** 248 Fed., *l. c.* 372, it was said:

> "Undoubtedly the cost of the improvements in a local assessment district must be apportioned in some just mode according to the benefits received by the several portions of the district. Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Ill. Cent. R. R. Co. v. Decatur, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132."

In **Bush v. Branson,** 248 Fed., *l. c.* 380, it is said:

> "But such power, arbitrarily exercised, imposing a burden without a compensating advantage of any kind, amounts to confiscation, and violates the due process provision of the Fourteenth Amendment. Myles Salt Co. v. Board of Commissioners, *supra.* In Gast v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523, a law establishing a paving district, levying the cost of paving on property fronting on the street, **based on area without providing for equal depth of the assessment district, was held to be void,** reversing the decision of the Supreme Court of Missouri." (Black-face type ours.)

The mode provided for by the ordinance under consideration was not just. It did not provide for "equal depth of the area assessment district." **This was the "mode described" and condemned in the Gast case.**

The instant ordinance made an **unconstitutional application of the Charter Provision** to the improvement of Broadway.

The discrepancies in the depth assessed from less than an inch to 297 feet is due to the irregularity or curving of Broadway, and to the different distances therefrom of converging or parallel streets. (See plat in evidence.)

This is not the case of a square bounded by principal streets in which the land might be assessed half way back from the improvement to the next street, as was the case L. & N. R. R. Co. v. Barber Asphalt Co., 197 U. S. 430. The application by this ordinance of the Charter provision to this portion of Broadway and to defendant's property, must necessarily result in taxing some land which was more than 290 feet away from Broadway, and in relieving other land from the tax which was less than one foot away. There can be here no reasonable presumption that substantial justice will be done, but the location of Broadway renders it inevitable that no uniform area assessment can be levied by the application of the Charter provision because no area district can be defined thereby which will have equal depths from Broadway.

It was legally impossible by this ordinance that this tax be apportioned with approximate equality. It was therefore an illegal exaction and not a proper exercise of the taxing power and defendant "suffered from the inequalities that have no justification in law."

The Gast case, Fairgrounds case, Fleming case, Loth case and Withnell case were referred to by this Court as illustrations of the fact that special taxation under the charter provisions in queston was far from proportional or reasonable, and that the rule for apportionment thereunder was so arbitrary and capricious that

the tax did not fall with like impartiality upon property upon which it justly and equitably should rest.

In the Gast case this Court decided that the provision in question did not provide a rule for apportionment of special taxes which promised justice in all ordinary cases, and as a whole might be expected to work well, but on the contrary that it was "a farrago of irrational irregularities throughout," and that the charter provisions contemplated just the results that were had in the cases above mentioned. Consequently this ordinance was unconstitutionally applied to defendant's property.

III.

No Opportunity Afforded Landowner to be Heard.

This ordinance enforcing the charter provision is not a legislative adjudication that the landowners' property is benefited, like the one in Wight v. Davidson, 181 U. S. 371, 45 L. Ed. 900. It is a general prospective provision. The charges in all cases are apportioned within the limited taxing district therein designated. Therefore it must frequently happen that the assessment will be in many cases never thought of by the people of the City of St. Louis, and upon which they could not possibly have passed, greatly exceed the benefits accruing from the improvement.

Upon all the property embraced in the district arbitrarily established the tax is automatically apportioned in the proportion that the area of each lot or tract of land bears to the area of the whole district, in utter disregard to the amount of

special benefits resulting to each lot from the improvement. The tax thus levied and assessed is a lien upon each lot and may be enforced by an action and the property sold to satisfy the tax. No hearing is accorded to property owners at any stage of the proceedings, either on the question of the limits of the district, or of the amount of the apportionment of the tax. The iniquity of these provisions lie in the fact that they lay down a general rule for the creation of an area district applicable to thousands of different situations, no two of which are alike, over which the tax is apportioned without any reference to the special benefits resulting from the improvements.

When the state through the constitution delegated to the people of the City of St. Louis the right to select a form of Charter and therein to provide among other things for the paving of streets, and the right to tax the inhabitants of the city for such paving, it was an inevitable condition of such grant that the said political subdivision should accord to its people an opportunity to be heard upon the question of the amount of the assessment for local improvements. When the people of the territory which was organized into the City of St. Louis adopted the charter, in which was contained this provision, there was in no sense a legislative determination that the property of the defendant was in any wise, or would be in any wise benefited by the opening of and paving of any particular street.

The only provision for a remonstrance or objection open to the landowner is as to the making of proposed improvement, and the kind of material and manner of construction. Collier Estate v. Western Paving Co., 180

Mo., *l. c.* 390. The decision of the courts of the State of Missouri deny the landowner the right to contend in the court, "that his property was not in fact benefited, or to the amount assessed was in accordance with such apportionment." Meier v. City of St. Louis, 180 Mo. 391; Houck v. Drainage Dist., 248 Mo. 387.

In this respect the proceedings and state decisions are different from those considered in Walston v. Nevin, 128 U. S. 578; Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist., 111 U. S 701; Spencer v. Merchant, 125 U. S. 345.

The right to be heard upon the question whether or not the street should be improved and the kind of material to be used therein is not sufficient. Londoner v. Denver, 210 U. S. 373. The landowner has a right to a hearing upon the amount of the assessment and upon all questions properly entering into that determination. St. Louis & Kansas City Land v. Kansas City, 241 U. S. 419; Embree v. Road District, 240 U. S. 242. This the charter and the decisions of the courts of the State of Missouri deny, and consequently the taxing of the landowners' property, under this section, is the taking of property without due process of law.

In **Londoner v. Denver,** 210 U. S. 373, it is said:

> "In the assessment, apportionment and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this Court has regarded substance, and not form. But where the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining

whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, **due process of law required that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law** fixing the time and place of the hearing. * * *

If it is enough that under such circumstances an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. * * *

The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it."

In **Fallbrook District v. Bradley**, 164 U. S. 112, at 167, 174-5, it is said:

"The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient. Whether it is provided for will be discussed when we come to the question of the proper construction

of the act itself (p. 167). * * * It has been held in this Court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay. Paulsen v. Portland, 149 U. S. 30, 41. But when as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in Spencer v. Merchant, 125 U. S. 345, 355, 356, and Walston v. Nevin, 128 U. S. 578. Such a hearing upon notice is duly provided for in the act (pp. 174-5). * * * As to the hearing upon the question of apportionment, the act * * * provides a general scheme for the assessment upon the property included in the district, and it also provides for a notice by publication of the making of such assessment, and an opportunity is given to the taxpayer to be heard upon the question of the valua-

> tion and assessment, and to make such objections thereto as he may think proper, and after that the assessors are to decide. Thus the act provides for a hearing of the land owner both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of the valuation and assessment of and upon his land included in the district" (p. 175).

In **Embree v. Road District**, 240 U. S. 242, it was said of an act of Missouri:

> "As the district was not established by the legislature, but by the exercise of delegated authority" (a county court, the governing body of a county, as the assembly was of this city) "there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited."

In **Land Company v. Kansas City**, 241 U. S. 419, 430, it was said:

> "Where assessments are made by a **political subdivision**, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination. 'If the legislature' as has frequently been stated 'provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.' Spencer v.

Merchant, 125 U. S. 345, 355, 356; Paulsen v. Portland, 149 U. S. 30, 41; Bauman v. Ross, 167 U. S. 548, 590; Goodrich v. Detroit, *supra*. What is meant by his proportion of the tax is the amount which he should be required to pay or with which his land should be charged. As was said in Fallbrook, etc., District v. Bradley, 164 U. S. p. 175, when it was found that the land of an owner has been duly included within a benefit district, 'the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay.' See also, French v. Barber Asphalt Paving Company, 181 U. S. 324, 341."

To the same effect see State v. Colbert, (Mo.) 201 S. W. 52; McGehee on Due Process of Law, p. 248; City of Sandersville v. Bell, 146 Ga. 737, 92 S. E. 218; Bouslog v. City of Gulfport (Miss.), 72 So. 899; Violet v. Alexander, 92 Va. 561; Stuart v. Palmer, 74 N. Y. 183; Coe v. Armour, 237 U. S. 413.

The language used in these authorities is susceptible of only one construction, consistently maintained, developed and applied. Thus, the Fallbrook case, first in time, clearly demonstrates the distinction between the act of the state itself, and that of its delegate, in respect to the notice and opportunity for hearing. The Embree case maintains the same distinction and applies it to a Missouri county court which is, for such purposes, the county authority corresponding most nearly to the Municipal Assembly for the City of St. Louis. And finally, the Land Company case in terms defines the meaning of the Fallbrook case by the language "a political subdivision, a taxing board, or court," and applies the doctrine of the Fallbrook case to Kansas City, which is

organized and exists by virtue of the same identical provisions of law which alone permit the legal existence of the City of St. Louis. And, too, St. Louis is a "political subdivision" of the state. Northcutt v. Eager, 132 Mo. 265, at 273; Steffen v. St. Louis, 135 Mo. 44, at 48-9; Straub v. St. Louis, 175 Mo. 413. It is impossible to escape the conclusion that the power of special taxation must be exercised by the City of St. Louis with notice and opportunity to be heard, because of the Federal Constitution.

The answer shows that the assessments attacked purport to be authorized by ordinances of the City of St. Louis, and that neither by its charter nor by the ordinances designating the lands to be taxed and apportioning the same, was notice and opportunity to be heard either required or given. It follows that the special assessment so made lacks due process of law for want of such notice and opportunity.

Such hearing, in order to constitute due process, must be given, not **after**, but "**before** the assessment becomes a lien against his property." Soliah v. Heskin, 222 U. S. 522. And must be provided by the law itself, and not left to the discretion of the courts to provide it in a suit to enforce the lien.

In **Coe v. Armour Fertilizer Co.**, 237 U. S. 425, this Court said:

> "So in Central Georgia R. Co. v. Wright, 207 U. S. 127, 138, the Court said: 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' In Roller v. Holly, 176 U. S. 398, 409, the Court declared: 'The right of a citizen to due process of law must rest upon a basis more

> substantial than favor or discretion.' And in Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the Court as such."

We have heretofore called the Court's attention to the fact that the trial court refused defendant a hearing under the decisions of our Supreme Court, that a land owner cannot be heard to contend "that the property was not in fact benefited or to the amount assessed in accordance with such apportionment."

The Supreme Court of the State of Missouri, in its decision of this case, said of this question (269 Mo., *l. c.* p. 555):

> "In construing said Section 14 of Article 6 in the Meier case (p. 409), we have also held that the special assessments authorized thereunder did not amount to a taking of the owner's property without due process of law; **that the procedure authorized by said section in regard to publication of notice to the property owners satisfies the constitutional requirement and constitutes due process of law as to matters to be passed upon by the tribunal upon which is devolved the duty of ascertaining the facts and acting thereon.**" (Black face type ours.)

The notice referred to is the one heretofore set out in the statement of the case. It has to do only with objections to the necessity of the proposed improvement and the "kind of material and manner of construction," and nothing at all to do with the question of the validity or the extent of the tax. It in no wise

satisfies the constitutional requirement of due process of law. The courts of Missouri have held that "there was no time or place where they (the land owners) could object or have their objections heard to the establishment of the area district prior to issuing of the tax bills."

The Supreme Court of Missouri, in **Collier Estate v. Western Paving & S. Co.**, 180 Mo., *l. c.* 390, speaking of these charter provisions as to notice and hearing, said:

> "The only provision for remonstrance and objection open to the property owner is as to 'the proposed improvement' and 'the kind of material and manner of construction.' The plaintiffs might well have been willing and anxious to have Kingshighway improved in the manner and of the material used, and still they would have the right to object to being taxed in an unauthorized manner for such improvement. **There was no time or place where they could object or have their objection heard to the establishment of the area district prior to the issuing of the tax bills.**" (Black faced type ours.)

It is respectfully submitted that the decision of the Supreme Court of Missouri in this case erred in holding that the publication of a notice for a hearing as to the expediency of the "improvement" and the "materials and manner of construction" constituted due process of law.

It inevitably follows that this ordinance assessing a tax for the payment of a local improvement which did not afford the defendant an opportunity to be heard upon the definition of the district, the determina-

tion of the property benefited, the rule of aportionment and all other questions entering into the determination of the amount of the benefit and the amount of the tax is void.

In **Coe v. Armour Fertilizer Works**, 237 U. S. 413, 424, 59 L. Ed. 1032, it is said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77.

This defect in the law is not cured by claiming that the defendant had no adequate defense upon the merits and a hearing would be of no benefit.

The charter provisions now under consideration were repealed over three years ago. The fact that they have been discarded is a recognition of their injustice and the gross inequalities produced by them.

It is respectfully submitted that the tax bills are void, and that the judgment of the Supreme Court of the State of Missouri should be reversed.

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8.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM W. WITHNELL,
Plaintiff in Error,
vs.
RUECKING CONSTRUCTION COMPANY,
Defendant in Error.
No. 142

In Error to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM W. WITHNELL,
Plaintiff in Error,
vs.
RUECKING CONSTRUCTION COMPANY,
Defendant in Error.
No. 142

In Error to the Supreme Court of Missouri.

STATEMENT OF FACTS ON BEHALF OF RESPONDENT IN ERROR.

The statement of facts as set out in the Brief of the plaintiff in error is correct as far as it goes. Defendant in error simply desires to make the following addition to said statement of facts in order that the Court may have a more comprehensive statement before it. On pages 3, 4 and 5 of the brief of plaintiff in error there are set out quotations from the decision of the Supreme Court of Missouri, in Division No. 2, and of the Court in banc (to which the case was transferred from Division No. 2) in passing on the case at bar. The excerpts quoted do not, in our opinion, sufficiently put before this Court the action taken and the reasons

upon which such action was based, by the Missouri Supreme Court when it decided this case, and from which decision this writ of error was taken. A reading of the two opinions will show that Division No. 2 of the Missouri Supreme Court, when passing on this case, ignored the memorandum opinion filed by this Court when denying the petition for rehearing in the Gast case, 240 U. S. 60, and shows that Division No. 2 did not give full and careful consideration to the actual points involved in this case. The quotation contained in brief of plaintiff in error from the decision of the Missouri Supreme Court en banc in passing on the case at bar falls short of showing the full reasons upon which the affirmation of this case was based by the Missouri Supreme Court. A reference to the opinion in that case of the Missouri Court *en banc* (see 269 Mo. 546) will show that the Missouri Supreme Court *en banc* went into an elaborate consideration of all the points involved; that it gave full consideration and deference to the decision of this Court in the Gast vs. Schneider case, 240 U. S. 55; that it analyzed the facts in the case at bar so far as the principles enunciated by this Court in the Gast vs. Schneider case applied; that the Court *en banc* found, as a matter of fact, and so decided, that

> "The plat of the district shows that the property east and west of Broadway in the matter of the material subdivision of same for the purposes of this assessment is treated with the utmost fairness and as much equality as the character of same will permit. Wherever any discrepancy occurs and it is but seldom, it is due to the irregularity or curving of Broadway and no other subdivision could have been made promotive of greater uniformity in the placing of the burdens upon the property in the district." (l. c. 554.)

And on page 557 of the same opinion said:

"From all of these rulings it is evident that the court did not intend to hold the Charter of the City of St. Louis in regard to street improvement invalid, but simply decided that the ordinance based upon the Charter was invalid in that particular case on account of the unusual facts there presented so far as it was attempted to base the assessments on the area rule. The right of complaint on account of the injustice there evident, being limited to persons thus assessed. In this holding no question is raised as to the validity of the ordinance authorizing the levy of taxes for special assessments on the frontage rule. However, this is not necessary to be discussed here. In short, the ruling in the Gast case considered and determined only the fact then before the court, and did not assume to determine where a special assessment was levied in conformity with the Charter provision and with a proper regard for the rights of the property owners that such assessment would be held invalid. There is, therefore, under this ruling no authority for the contention that the levy of the special assessments in the case at bar was violative of the Federal Constitution. In view of all of which we are of the opinion that the defendant is not entitled to the affirmative relief for which he prays."

Further, the Court, at page 555, said:

"There was no evidence offered to sustain the allegations of the cross-bill that the tax bills were confiscatory or that they were disproportionate to the benefits received in that the city had escaped the payment of its just proportion of the cost of the improvement because of its ownership of certain property within the benefit district."

On page 8 of plaintiff's in error statement of fact,

being the last paragraph in said statement, reference is made to the cases of Meier vs. City, 180 Mo. 391, and Houck vs. Drainage Dist., 248 Mo. 383. Whether this reference to these cases is proper in a statement of facts as set forth in said brief is doubtful, but if referred to and made a part of the statement of facts, said statement should have gone further and shown to this Court that the only condition in the State of Missouri under which the land owner is deprived of an opportunity to appear and defend against the enforcement of the lien when sued for (upon the ground that his property is not benefited or as to the amount of the benefit) is where such tax has been levied pursuant to legislative authority, in which case, both under the decisions of the courts of Missouri and of this Court, no notice of any kind is required. See authorities cited under Point II of this brief.

Article IX, Sections 20-25, of the Constitution of the State of Missouri authorized and empowered the City of St. Louis to formulate a scheme and charter defining and specifying its powers, which scheme and charter, by the terms of the Constitution, were required to be submitted to the qualified voters of the City, and if adopted, the Constitution provided that the scheme and charter so adopted should thereafter become the organic law of the City of St. Louis. Pursuant to this authorization, the City of St. Louis in 1876 duly adopted a scheme and charter which has ever since been its organic law. Section 14, Article VI, of the Charter of the City of St. Louis, under the terms of which the special tax bills involved in this proceeding were issued, constitutes a part of such organic law of the City of St. Louis. With these additions, the statement of facts as set forth in brief of plaintiff in error fairly sets forth the record in this case.

BRIEF.

I.

The Charter of the City of St. Louis and the powers therein conferred upon the City with respect to municipal matters, including special assessments for local improvements, are an express grant by the Constitution of the State of Missouri, and these powers, when exercised by the City, are legislative powers as distinguished from delegated powers.

Constitution of the State of Missouri, Art. IX, Sec. 20 to 25.
City of St. Louis v. Western Union Telegraph Co., 149 U. S., l. c. 467.
City of St. Louis v. Liessing, 190 Mo., l. c. 480.
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II.

Where the amount of the benefit conferred and the proper adjustment of the taxes among the property owners and the assessment and classification of the property to be improved are fixed and designated by a legislative act, no notice or hearing is required, in order to constitute due process of law within the meaning of the Federal Constitution.

Gast Realty & Investment Co. v. Schneider Granite Co., 245 U. S. 288.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

Embree v. Road District, 240 U. S., l. c. 250, 251.

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III.

The constitutionality and the legality of tax bills issued pursuant to the provisions of Section 14 of Article VI of the Charter of the City of St. Louis have been sustained both by the Supreme Court of the State of Missouri and by this Court.

Meier v. City of St. Louis, 180 Mo., l. c. 409.

Pryor v. Construction Co., 170 Mo., l. c. 451.

Ruecking Const. Co. v. Withnell, 269 Mo., l. c. 546.

Gast Realty & Investment Co. v. Schneider Granite Co., 245 U. S. 288.

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IV.

This Court and the Missouri Supreme Court have both held where tax bills were issued for street improvements under the authority of Article VI, Section 14, of the Charter of the City of St. Louis that the one-fourth levied and assessed under the front foot rule is valid and incontestable even where the three-fourths of such tax bills assessed under the area rule are invalid because of gross inequalities in the assessment thereof.

Ruecking Const. Co. v. Withnell, 269 Mo. 546.

Schneider Granite Co. v. Gast Realty & Investment Co., 269 Mo. 561.

Gast Realty & Investment Co. v. Schneider Granite Co., 245 U. S. 288.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

V.

In levying assessments for special improvements, there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. And the fact that there may be inequalities is not enough to invalidate the tax bills.

Gast Realty & Investment Co. v. Schneider Granite Co., 245 U. S. 288.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S., l. c. 430.

Houck v. Little River Drainage Dist., 239 U. S., l. c. 265.

Wagner v. Leser, 239 U. S., l. c. 216.

Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S., l. c. pp. 433-6.

ARGUMENT.

The argument under the five points of this brief of the defendant in error will necessarily be an answer to Points I, II, III and V of the brief of plaintiff in error, but before taking up the argument under the said five points of our brief we will here take up points IV and VI of the brief of plaintiff in error, and also the contention in his argument as set forth on page 18 of his brief to the effect that the property of the city, to-wit, blocks 2663, 2664 and 2661-E are improperly assessed and that by reason of their being improperly assessed, an undue burden is thrown upon the property of the plaintiff in error.

As to point IV in the brief of the plaintiff in error, we have only this to say: We concede, of course, without question, the legal proposition set forth in said point, to-wit:

> "The City of St. Louis is a political subdivision of the State of Missouri."

It is not necessary to cite any authorities to sustain that proposition, but it is a different kind of a political subdivision from a county or any other subdivision which acts by, under and through delegated authority. The City of St. Louis, as we show under Point I of our brief, is a political subdivision unique of its kind, deriving its powers directly from the Constitution of the State of Missouri, and having an express grant under the Constitution of the State of Missouri of certain powers which, when exercised by the City of St. Louis, are legislative powers as distinguished from delegated powers, and, therefore, the City of St. Louis stands in

a class separate and distinct from those bodies which are either created by or receive from the Legislature of the State of Missouri certain delegated authority. (See authorities cited under Point I of this brief.)

Point VI of the brief of plaintiff in error sets forth this proposition:

> "The land owner must have an opportunity to be heard as to the validity and apportionment of a special assessment for local improvements before it becomes a lien on his property. 'The law itself must save the parties' rights and not leave them to the discretion of the Court as such.' In a suit to enforce the lien." Citing a number of cases to sustain this proposition.

In the abstract this proposition is correct, but when applied to the facts in the case at bar, the statement of law set forth has no application nor do the authorities cited under said Point VI have any application whatsoever to the points involved in this proceeding. The brief of plaintiff in error in enunciating the proposition relied upon under Point VI ignores the vital fact, that the City of St. Louis, exercising legislative powers conferred upon it by the Constitution of the State of Missouri, had the power in forming the benefit district for the improvement of Broadway, to fix the amount of the benefits conferred and the proper adjustment of the tax among the property owners, and the assessment and classification of the property to be improved and that, this being a legislative act, no notice or hearing was required to be given to the property owners whose property was included in the district. (See authorities cited under Point II of this brief, and argument under our Point II.)

Further than that, the authorities cited under Point VI of plaintiff's in error brief do not touch the question at issue in this case. Security Trust Co. v. Lexington, 203 U. S. 323, simply holds that where the assessor levied an assessment against the Trust Company for back taxes and the assessment was made by entering the same upon the tax books for the year 1898 as of the date of December 31st, where, under the State laws, all the books of regular assessments were turned over to the Auditor on the 1st day of December, who transmits them to the Board of Equalization and thereafter, under the laws of the State, these assessment books are open to the public for examination and every person assessed had a right to appear before the Board of Equalization to make complaint, and under the method pursued for assessing the back taxes against the Trust Company, no opportunity was given it to be heard upon any complaint as to the legality of the special assessment made on the 31st day of December, and the Trust Company brought action to enjoin the collection of these taxes and upon hearing of this suit, the Court reduced the amount of the special taxes and gave judgment against the Trust Company for the amount which it found, after hearing, was due, that then and in that event, while the Trust Company was entitled to have notice, nevertheless as it had a hearing on the trial, this was all it had a right to expect.

London v. Denver, 210 U. S. 373, simply holds that where, under the assessment laws, a proviison was made for the property owner, upon filing objections, to have a hearing at which the objections were to be considered and where objections were filed with the proper body to hear and determine same, and thereafter, without further notice or hearing and without giving the

objectors an opportunity to be heard, the City Council enacted the ordinance of assessment. In such case this Court held that no opportunity for objectors to be heard had been given, and as the law specifically provided that such objections might be filed and a hearing had, therefore, upon these facts there was a denial of due process of law guaranteed by the Fourteenth Amendment.

The case of Coe v. Armour, 237 U. S. 413, was a case in which a judgment creditor against a corporation had an execution issued and levied upon the property of an alleged stockholder in the corporation. No opportunity at any time was given to the alleged stockholder for testing any questions involved in the proceeding. This Court held that in such a proceeding the alleged stockholder whose property had been levied upon had been denied due process of law.

In the case of St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S. 419, the only question involved was the right of the property owner whose property had been assessed for benefits to insist upon being made a party to the condemnation proceeding or to be heard with respect to the amount of the award in condemnation suit. This, and this only, was the point at issue in that case as we read the decision.

In the case of Embree v. Kansas City & L. & B. Road Dist., 240 U. S. 242, the question involved was the legality of road district bonds and the levying of special taxes to pay same where the district was not established or defined by Legislature, but by an order of the County Court made under a general law. As this was exercising a delegated authority, this Court said in its opinion (l. c. 247):

> "As the district was not established by Legislature, but by the exercise of delegated authority, there was no legislative decision that its location, boundaries and cost were such that the land therein would be benefited by its creation and what it was intended to accomplish, and this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands were thus benefited."

The case of L. & N. Co. v. Central Stock Yards, 212 U. S. 132, does not, in any way, bear upon the point to sustain which it is cited.

The case of Roller v. Holly, 176 U. S. 398, was a proceeding to recover judgment on certain notes and to enforce a vendor's lien upon the land on which a vendor's lien was reserved to secure the payment of said notes, but in our opinion in no possible way does the decision in that case or anything said therein bear upon the question involved in this proceeding.

The case of Fallbrook v. Bradley, 164 U. S. 112, was a proceeding to test the legality of the creation of an irrigating district in the State of California. In that case the act of the Legislature, under which the district was formed, did not itself name any irrigating district and did not decide as to the nature and quality of any special lands which were to be included in the district, but simply gave a general statement as to what conditions must exist in order to permit the inclusion of any land within the district. These subjects were delegated to a Board of Supervisors. This Court held in that case that if the Legislature had exercised the legislative power in creating the district, determining the bounds, settling what lands should be included and

what lands should pay, it had full authority to do so without any notice or hearing, but in view of the fact that a hearing was provided for under the delegated authority by the Board of Supervisors and as they had given the land owners an opportunity to be heard, the objection of the land owners to the creation of the district by the Board of Supervisors was untenable.

In the case of State v. Colbert, a decision by the Missouri Supreme Court, reported in 201 S. W. at page 52, not yet officially reported, the question involved was the legality of the formation of a road district by a County Court under authority delegated to it by an act of the Legislature. The direct question involved was the legality of the creation of the road district by the County Court where the boundaries of the proposed district were changed by the County Court after the original boundaries had been determined upon due notice and petition, as required by law. No notice having been given by the County Court of the proposed changes, it was held that such a change of boundaries was illegal and void because the County Court, acting under delegated powers, must give notice of all proceedings for which notice is required. This would not have been the case, of course, had the County Court been acting as a legislative body under powers granted directly by the Constitution of the State.

This point was directly involved in the case of French v. Barber Asphalt Paving Co., 181 U. S. 324 (45 L. E., l. c. 883). The report of that case in Law Edition sets out, with great fullness, the briefs of the respective parties, and at page 883 the following proposition of law was briefed to this Court:

> "When the benefit to accrue from a local improvement was to be apportioned according to a

> fixed rule determined in advance by legislative act, the property owner is not entitled to notice or hearing at the time that the assessment is made in respect to the amount of the assessment."

So this Court there had the point now urged by plaintiff in error directly before it. The special tax bills in that case were issued under a charter substantially the same as the charter of the City of St. Louis so far as the method of establishing the improvement district by a fixed rule was concerned, and this Court in that case held the tax bills issued without notice and which were apportioned according to a fixed rule determined in advance and, therefore, similar to the tax bills involved in this case, to be constitutional, legal and binding, and thereby gave its approval to the proposition for which we are now contending, to-wit, that

> "When the benefits to accrue from a local improvement are to be apportioned according to a fixed rule determined in advance by a legislative act, the property owner is not entitled to notice or hearing at the time that the assessment is made or in respect to the amount of the assessment."

As to the contention made on page 18 of the brief of plaintiff in error to the effect that the City, as the owner of city blocks 2661-E, 2663 and 2664, had been relieved of the proportion of the taxes which should justly have been borne by said property, we have examined the record and the plat filed herewith with the utmost care and we are utterly unable to catch the drift and force of this contention. The only thing in the record which throws any light upon this matter is found in the Transcript of the Record, page 45, where Leo Osthaus, witness for defendant, testified as follows:

> "The east half of city block No. 2661-E is city

property. The eastern boundary line between Chariton Street and Meramec Street is distant on Chariton Street 295 feet, and on Meramec Street 168.10 feet. The opposite district line is here distant from Broadway 56.5 feet, to point in city block 2662, which is owned by the city.

City blocks 2663 and 2664 are also owned by the City, and used as the Work House, and are walled or fenced in, and Piedmont Street is cut off by wall, and the boiler house stands right here."

The property owned by the City is blocks 2661-E, 2662, 2663 and 2664, and are levied upon and assessed in strict accordance with the terms and provisions and requirements of the City Charter fixing the improvement district and determining how the assessments should be laid. In no respect is the assessment upon the City property different from the assessment against every other property owner in the district. The City property in blocks 2661-E and 2663 fronts partly on Broadway and partly on Ohio Avenue. That part of it which fronts on Ohio Avenue is not included in the assessment district either for front or area assessment, which is as it should be. Under the method for assessing for improvement purposes as fixed by the Charter of St. Louis one-fourth of the improvement is charged against the frontage and three-fourths against the area represented by the frontage. That part of the city property embraced in city blocks 2661-E and 2663 which fronts on Ohio Avenue is, of course, subject to assessment one-fourth by the front foot rule and three-fourths by the area rule for the improvement of Ohio Avenue. Hence, it would be unjust that it should be charged for the improvement of Broadway on which it does not front. By reference to the plat filed herewith, which plat is identical with the

plat filed with his brief by the plaintiff in error, it will be seen that the east line of Ohio Avenue intersects the east line of Broadway at the point where the assessment district so far as lot 2663 ends, and that that part of lot 2663 which is south of the district line, as shown on the map, fronts exclusively on Ohio Avenue. So far as the east half of city block 2661-E is concerned, it is entirely outside the improvement district, the same rule applying to it that is applied to the west part of block 2662 and all blocks where the intersection of cross streets creates a triangle.

Plaintiff in error says on page 18 of his brief:

> "There is in fact no street separating city block 2661-E from city block 2663."

We have examined the record with the utmost care, and fail to find any fact in the record which justifies this statement. An examination of the plats filed with the briefs will show conclusively that Ohio Avenue is a street which intersects Broadway at an angle, running diagonally for the entire distance of the plat, and that it separates city block 2661-E from city block 2663. Whether it has been improved or not, counsel for the defendant in error is unable to state, but the east line of Ohio Avenue intersects the east line of Broadway at the point indicated by the black line running from the eastern line of the improvement district at right angles thereto to the intersection of the east line of Ohio Avenue with the east line of Broadway. But whether or not Ohio Avenue is improved, cuts no figure in the proper interpretation of this case.

In this connection plaintiff in error makes the point that because the south part of city block 2663, owned by the city and being that part of the block fronting on

Ohio Avenue and bounded south by Chariton Street, is not included in the area assessment, therefore, approximately 70,000 square feet which ought to have been included in the improvement district is relieved of taxation and thereby plaintiff's in error property in city blocks 2608 and 2609 is subjected to inequities that have no justification in law. We have heretofore shown that this portion of city block 2663 should not be included in the area assessment because it has no front on Broadway, the street to be improved, but fronts exclusively on Ohio Avenue, a separate and distinct street for which, under the Charter provisions, it would be liable for assessment whenever Ohio Avenue was or is improved. But let us assume, merely for the sake of argument, that this property ought to have been included in the assessment district. What force or effect would there be in the contention of plaintiff in error that by omitting same his property in city blocks 2608 and 2609 has been subjected to inequities such as would nullify the whole assessment? Plaintiff in error asserts that the area of the portion of city block 2663 which was omitted is 70,000 square feet. The exact dimensions are not given of this particular portion of the lot and, therefore, we are unable to say whether or not the figures given are correct. Assuming that they are correct, 70,000 square feet would be, in round numbers, five and a half per cent of the total area of the assessment district, which is 1,243,301 square feet. The total assessment against all of plaintiff's in error property in the assessment district is $7,719.23, of which three-fourths or $5,789.43 is assessed under the area rule. Hence, if by omission of 70,000 square feet, a proportionate part thereof has been imposed upon the property of plaintiff in error in the assessment district, it would mean, in dollars and cents, that he has

been called upon to pay, in round numbers, five and a half per cent of $5,789.43 more than he otherwise would have been called upon to pay, or a total of $318.40 for his entire property in the assessment district having a total frontage of 948.36 feet on Broadway. Now, this Court has said, as we have shown under Point V of our brief, that:

> "In levying assessments for special improvements there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The fact that there may be inequalities is not enough to invalidate the tax bills."

See authorities cited under Point V of our brief.

Further than that, as we have demonstrated by mathematical calculation on pages 54 and 55 of this brief, under the method of assessment adopted combining the one-fourth front foot assessment with the three-fourths area assessment, plaintiff in error has been assessed $1,299.25 less than what his assessment would have been had the entire assessment been made against his property under the front foot rule. So that to the extent of about $1,300.00 the cost which ought to have been assessed against him, in fairness and justice, has been paid by owners of other property in the district. Even allowing, for the sake of argument, that the 70,000 square feet of city property in city block 2663 ought to have been included in the area assessment, and thereby $318.41 of the area assessment which ought to have been assessed against this 70,000 square feet has fallen upon the entire property of plaintiff in error in the district, nevertheless upon the mathematical demonstration as set forth in this brief, plaintiff in error is still, in round numbers, $980.84 better off than the oth-

er property owners in the district, for he would still be paying $980.84 less than his full fair share of the cost of entire improvement. But, as a matter of fact, the 70,000 square feet were properly omitted, for they did not front on Broadway or properly come in the assessment district.

The argument of plaintiff in error as to what the probable depth of lots in the assessment district would be when unsubdivided blocks are subdivided and on what streets said unsubdivided property within the assessment district would probably be made to front when subdivided into lots, as set forth on pages 18 and 19 of his brief, is not only purely hypothetical, but it is scarcely founded upon reason. The Court will take judicial notice of the fact that Broadway in the City of St. Louis is the longest and greatest travel artery in the City of St. Louis, running from the extreme north limits of the city to the extreme south limits of the city, covering a distance of upwards of fifteen miles. A lot fronting on Broadway would probably be worth three times the value of a lot fronting on a cross street. That is to say, if plaintiff in error subdivided his blocks 2620 and 2621, undoubtedly the lots will be made to front on Broadway, because by doing so they will have a value at least three times what their value would be if made to front on either Meramec or Gasconade Streets, and the corner lots, if fronting on Broadway, would have even an increased value, because it has been demonstrated in the City of St. Louis that corner lots fronting on an artery are worth from one and a half to twice the value of the next interior lot fronting on the artery and so undoubtedly the frontage will be on Broadway, not on the side street. We also note on page 19 of brief of plaintiff in error this statement:

> "The fact that the property of others (see plat) is improperly assessed, thereby lessening the amount defendant is required to pay, does not validate an unlawful assessment against his property. Two wrongs cannot make a right."

Replying to this, we beg to say that the decisions of this Court cited and quoted in this brief demonstrate, beyond controversy, that it is only the person who has been actually damaged and injured by the inequitable assessment of his property who can complain. If, by the improper assessment of the property of others within the assessment district, the complainant's taxes have been lessened so that he is not required to pay the amount which, upon a fair assessment, he would be compelled to pay, then he cannot complain because no wrong was done to him. The only person who can complain is that person whose assessment is such that he is required to pay more than he ought to pay upon a fair assessment of his property, taking into consideration all of the property in the assessment district, and then only if the assessment as to him is so inequitable and so unjust that it shocks the sense of fairness of the Court. It must be a gross inequality.

See Gast v. Schneider, 240 U. S., l. c. 60, where, in its memorandum opinion, this Court, speaking through Justice Holmes, said:

> "Our decision is limited, of course, to the particular ordinance before the Court, to the assessment of three-fourths determined in the mode described. * * * *To those who, like the plaintiff in error,* have suffered from the inequalities that have no justification in law."

Since no other person is complaining in the case at

bar of any assessment made saving and excepting the plaintiff in error, and since we have shown that the plaintiff in error has been assessed, taking every circumstance into consideration, less than what he would have been assessed had the assessment been made upon the front foot rule, so that instead of paying more than he should equitably have paid, he has really paid less, it follows that he has no ground for complaint, there is no lack of equity where he is concerned and his contention of injustice and inequality is without any just foundation.

In St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S., l. c. 430, this Court said:

> "It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all unless the assessment of other owners who have paid without question and are not complaining, shall be reopened and redetermined. The Fourteenth Amendment affords no basis for a demand of this sort."

Plaintiff in error, when this case was before the Supreme Court of Missouri, made the same point, to-wit, that the city property escaped its fair share of assessment for the benefits the city property derived from the improvement. In passing on this point, after fully considering it, the Missouri Supreme Court said in the Ruecking Const. Co. v. Withnell, 269 Mo., l. c. 555:

> "There was no evidence offered to sustain the allegations of the cross-bill that the tax bills were confiscatory and that they were disproportionate to the benefits received, in that the city escaped the payment of its just proportion of the cost of the

> improvement because of its ownership of certain property within the benefit district," (in referring to the ownership by the city of city blocks 2661-E, 2662, 2663 and 2664).

Nor can we see how the fact that city blocks 2663 and 2664 owned by the city are used as a Work House and are walled and fenced in for that purpose, would, in any manner whatsoever, affect the situation. The lines were run, the assessments made, the benefits assessed and the taxes imposed upon the city property exactly as they were imposed on all other property in the district; that is to say, the assessments were made strictly in accordance with the requirements of the city charter and the ordinances passed thereunder for the purpose of laying out the improvement district from which the tax bills in question arose.

On page 37 of the brief for the plaintiff in error the statement is made:

> "The charter provisions now under consideration were repealed over three years ago. The fact that they have been discarded is the recognition of their injustice and the gross inequalities produced by them."

We fail to find anything in the record which justifies either the statement made or the conclusion reached. The charter of the City of St. Louis, under the provisions of which the tax bills involved in this suit were issued, was adopted in 1876. It is true that three years ago the City of St. Louis, after a great many abortive attempts, finally adopted a new charter. For fully forty years the City of St. Louis lived and had its being under the old charter. From a straggling, over-grown,

countrified town, with limestone streets and dirt roads, it thrived and grew under the provisions of the criticized charter relating to street improvements, until at the end of forty years it had become one of the best paved cities in the country, covering an area of about 175 square miles, with hundreds of miles of well paved streets of granite block, wood block, asphalt, brick and granite bituminous. Surely such a record of successful achievement in street improvement does not indicate either injustice or gross inequalities existing under the law criticized. If it be a fact that the clauses in the charter in question were repealed or changed or altered, that would not indicate either that the old law was unjust or that its provisions produced gross inequalities. At most, it would indicate that the new generation had concluded, in view of the altered and changed conditions in city development, they were qualified to provide a more comprehensive system of taxation than existed under the old. Whether their hopes are to be justified will depend upon the developments of the future and mayhap they may look back with regretful thoughts at the system abandoned for the system adopted. Be that as it may, it is a strange argument that the repealing of any law, whether it had been in force a short time or a long time, is an admissoin of its injustice and inequality.

Argument under Points I, II, III, IV and V of the Brief of the Defendant in Error.

POINT I.

The Charter of the City of St. Louis and powers therein conferred upon the City with respect to municipal matters, including special assessments for local improvements, are an express grant by the Constitution

of the State of Missouri, and these powers when exercised by the city are legislative powers as distinguished from delegated powers.

The decisions of this Court and of the Supreme Court of the State of Missouri on this proposition are conclusive, and, in our opinion, practically preclude any negative argument on the proposition laid down. This Court on this proposition has spoken with conclusive force. In City of St. Louis v. Western Union Telegraph Co., 149 U. S., l. c. 467, this Court said:

> "As the legislative power of a State is vested in the Legislature, generally that body has the supreme control and it delegates to municipal corporations such measure thereof as it deems best. The City of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the Legislature, but it framed its own charter under express authority from the people of the State, given in the Constitution. Sections 20 and 21 of Article IX of the Constitution of 1875 of the State of Missouri authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city which, when ratified by them, was to become 'the organic law of the city.' * * * In pursuance of these provisions of the Constitution, a charter was prepared and adopted and is, therefore, 'the organic law' of the City of St. Louis, and the powers granted by it, so far as they are in harmony with the Constitution and laws of the State, and have not been set aside by any act of the General Assembly, are the powers vested in the city. This charter is an 'organic act' so defined in the Constitution and is to be construed as organic acts are construed. The city is in a very just sense 'an *imperium in imperio.*' Its powers are self-appointed and the reserved control existing in the General Assembly

does not take away this peculiar feature of the charter."

See Constitution of Missouri, Article IX, Sections 20-25.

In City of St. Louis v. Liessing, 190 Mo., l. c. 480, the Court said:

> "The City of St. Louis, as has been repeatedly declared by this Court, derives its charter in pursuance of constitutional provision, and the police powers delegated therein are conferred by the State upon the municipality, and so long as they are not inconsistent with the Constitution and laws of the State, they are valid upon all who come within their scope and authority."

In Sluder v. Transit Co., 189 Mo., l. c. 128, the Court said:

> "The freeholders' charter of the City of St. Louis, adopted August 22, 1876, has all the force and effect of a legislative charter. (Kansas City v. Oil Co., 140 Mo. 468; City of St. Louis v. Gleason, 15 Mo. App. 25; *Ibid* v. *Ibid*, 93 Mo. 33.)"

In Meier v. St. Louis, 180 Mo., l. c. 409, the Court said:

> "As to the contention that the special assessments amount to a taking of plaintiff's property without due process of law, it may be said that no notice is required by the Constitution to be given property owners respecting those matters which the Legislature itself determines, or delegates to the municipal authorities. (Spencr v. Merchant, 125 U. S. 345; Williams v. Eggleston, 170 U. S. 304; St. Louis v. Rankin, 96 Mo. 497.)"

* * * * * * *

"When the taxing district has been fixed by valid legislation, and when the apportionment of the cost of the improvement upon the property in the district has been so fixed, the owner of the property in the district cannot be heard to contend in the court that his property was not in fact benefited, or to the amount assessed in accordance with such apportionment. (Pyror v. Construction Co., 170 Mo. 439.)"

* * * * * * *

"The charter of St. Louis, adopted by a vote of its people in obedience to an express grant by the Constitution of the State, has, with respect to municipal matters, including special assessments for local improvements, all the force and effect of an act of the Legislature. (City of St. Louis v. Fischer, 167 Mo. 654; Pryor v. Construction Co., 170 Mo. 439; St. Louis v. Gleason, 15 Mo. App. 25; *Ibid* v. *Ibid*, 93 Mo. 33; Kansas City v. Oil Co., 140 Mo. 458.)"

In the case of Albright v. Fisher, 164 Mo., l. c. 64, the Court said:

"Thus, in St. Louis v. Foster, 52 Mo., l. c. 515, Wagner, Judge, when speaking of the acts of municipal assemblies when convened in their official capacity, said: 'Their charters are their constitutions, which authorized councils to act, and a city council is 'a miniature general assembly, and their authorized ordinances have the force of laws passed by the Legislature of the State.'"

In the case of Knapp, Stout & Co. v. City, 156 Mo., l. c. 353, the Court, in speaking of an ordinance passed by the City of St. Louis under the terms of its constitutional charter, said:

"The passage of an ordinance such as the one in question comes within the legislative powers ex-

> pressly delegated to the city by its charter. * * * That power will not be controlled or reviewed by the courts."

In the case of State *ex rel.* v. Mason, 153 Mo., l. c. page 52, the Court said:

> "St. Louis is organized directly under the Constitution. It is not in either of the four classes of cities which have been defined by the Legislature under the Constitution."

In State *ex rel.* v. Mason, 155 Mo., l. c. 501, it is said, in speaking of the city as organized under its constitutional charter:

> "That city is by the Constitution singled out and segregated from all other cities in this State by express mention by name as well as by peculiar and special provisions shared by no other city."

In the case of Kansas City v. Stegmiller, 151 Mo., at page 204, the Court said:

> "Again, we think it is plain that the framers of the Constitution *ex vi termini* excluded from its legislative classification the City of St. Louis, which it expressly authorized to adopt its own scheme and charter and all such cities as it authorized by Section 16, Article IX, to frame and adopt their own charters. These cities constitute two constitutional classes distinct from those chartered and classified by the Legislature."

So that it appears to us beyond question that the cases cited show conclusively that the powers granted to the City of St. Louis covering all legislation in regard to the creation of improvement districts and the levying of assessments and the issuing of tax bills

growing out of the same legislative power, have all the force and effect of an act of the Legislature, so far as the legality of the creation of the improvement district, and the assessment of benefits are concerned, and all such acts of the city stand on a parity with an enactment of the Legislature.

POINT II.

Where the amount of the benefit conferred and the proper adjustment of the taxes among property owners and the assessment and classification of the property to be made are fixed and designated by a legislative act, no notice or hearing is required in order to constitute due process of law within the meaning of the Federal Constitution.

In the case of Embree v. Kansas City & L. B. Road Dist., 240 U. S., l. c. 250-251, this Court said:

> "The claim that the land owners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously impressed upon our attention and requires but brief notice. *The ratings are not fixed in the exercise of delegated authority, but by the statute itself, which must be taken as a legislative decision that in a district lawfully constituted, in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.* (Wagner v. Leser, 239 U. S. 207; Houck v. Little River Drainage Dist., 239 U. S. 254; Myles Salt Co. v. Iberia Drainage Dist.,

239 U. S. 478; Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.)" (Italics are ours.)

In the case of Houck v. Little River Drainage Dist., 239 U. S., l. c. 262, this Court, speaking of improvement districts and assessments arising therefrom, said:

> "With respect to districts thus formed, whether by the Legislature directly or in an appropriate proceeding under its authority, *the Legislature may itself fix the basis of taxation or assessment;* that is, *it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse.* (Citing Spencer v. Merchant, 125 U. S. 345; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112; Parsons v. Dist. of Columbia, 170 U. S. 45; French v. Barber Asphalt Paving Co., 181 U. S. 324; Wight v. Davidson, 181 U. S. 371; Wagner v. Leser, 239 U. S. 207.)" (Italics are ours.)

In the case of French v. Barber Asphalt Paving Co., 181 U. S., l. c. 341, in passing upon the question as to the legality of the taxing district and the assessments upon the property contained therein, this Court quoted from Spencer v. Merchant, 125 U. S. 356, with approval, the following doctrine:

> "Unless the Legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this Court in Spencer v. Merchant, 125 U. S. 356; Walston v. Nevin, 128 U. S. 578."

And in the same case (French v. Barber Asphalt Paving Co., 181 U. S. 342) this Court also said:

"The class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

And in the same case at page 343 this Court said, speaking of the assessment of costs and how the same should be made:

"*The question is legislative, and like all legislative questions may be decided erroneously;* but it is reasonable to expect that with such latitude of choice, the tax will be more just and equal than it would be were the Legislature required to levy it by one inflexible and arbitrary rule. (Cooley on Taxation, 447.)

The Courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage, or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." (Italics are ours.)

In the case of Meier v. City of St. Louis, 180 Mo., l. c. 409, the Court said:

> "As to the contention that the special assessments amount to a taking of plaintiff's property without due process of law, it may be said that no notice is required by the Constitution to be given property owners respecting those matters which the Legislature itself determines or delegates to municipal authorities. * * * The charter of St. Louis adopted by a vote of its people in obedience to an express grant by the Constitution of the State has, with respect to municipal matters, including special assessments for local improvements, all the force and effect of an act of the Legislature." (Citing many cases.)

Plaintiff in error in his argument under Point I of his brief on page 14 contends that because the district lines of any improvement district for street improvements are automatically fixed by the Charter and because the ordinance passed for the carrying out the same could not add to or take from the benefit district, therefore there is no legislative action by the municipal assembly of the City of St. Louis in the establishment of improvement districts under the charter of St. Louis. This contention ignores the many decisions cited under this point of our brief. It ignores the decision of this Court in City of St. Louis v. Western Union Telegraph Company, 149 U. S. 465, in which opinion this Court has fully discussed and considered the status and functions of the charter of the City of St. Louis, and in which decision at page 467 this Court has said that the City of St. Louis, as a municipality, occupies a unique position. This is true. The City of St. Louis was the first city in the United States, as we understand it, to disassociate itself entirely from any

county and to become a self-controlling, self-legislating, independent city, deriving its powers entirely and directly from the Constitution, as distinguished from any other subdivision of the State Government. In the above mentioned case (St. Louis v. Western Union, 149 U. S. 465) this Court said that when the City of St. Louis adopted its charter by the qualified voters thereof, the city charter became the "organic law" of the city; that when this charter was adopted the city became, in a very just sense, "an *imperium in imperio,*" that its powers were self-appointed. In other words, this Court laid down the doctrine that the powers exercised by the City of St. Louis under its charter, which was a direct grant from the State under the Constitution of the State, were self-enforcing; that the charter of the City of St. Louis was derived directly from the Constitution, placing the city upon an equality, as to all matters over which it was granted control, with the Legislature itself. From all of which it would appear clear that if in this "organic act" the City saw fit to establish a method of creating street improvement districts which had fixed and definite boundaries and which, as provided in the "organic act," should apply to other districts thereafter recommended by the Board of Public Improvements, this was simply carrying out those legislative functions granted to the City of St. Louis by and under its "organic act" so received directly from the Constitution, and if perchance anything further was called for in the way of legislative action, the charter provided that when an improvement district was recommended by the Board of Public Improvements, an ordinance of the City Council of the City of St. Louis, acting under the powers and terms conferred upon the city by its charter, should be passed to effectuate and carry out the charter provisions re-

lating to the formation and creation of improvement districts. This method of establishing improvement districts has been repeatedly adjudicated to be a legislative function as distinguished from a delegated authority. (See authorities cited under Point I of this brief, and the numerous excerpts therefrom set forth under our argument applying to Point I.)

Further than that, this Court and the Missouri Supreme Court have both repeatedly sustained the validity and constitutionality of the special tax bills issued in pursuance of the exercise of the powers granted to the City of St. Louis by Article VI, Section 14, of the charter of the City of St. Louis, both this Court and the Missouri Supreme Court holding in numerous decisions that the action so taken by the city was directly in accordance with its charter provisions and that the tax bills issued thereunder were legal. See French v. Barber Asphalt Paving Co., 181 U. S., l. c. 342, 343; Meier v. City of St. Louis, 180 Mo., l. c. 409; Ruecking Construction Co. v. Withnell, 269 Mo. 546; Schneider v. Gast Realty & Investment Co., 269 Mo. 561; Schumate v. Heman, 181 U. S. 403; Gast Realty & Investment Co. v. Schneider Granite Co., 245 U. S. 288; Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

Had the plaintiff's in error contention now under discussion been correct, this Court could not in the decisions just cited have held the special tax bills so issued legal and binding. This phase of the case was directly involved and passed upon by this Court in the cases just referred to, which cases directly involved the legality of special tax bills issued strictly in accordance with and under the terms of Article VI, Section 14, of the Charter of St. Louis. Further than that, the di-

rect point now under discussion in this case was brought before this Court in the case of French v. Barber Asphalt Paving Co., *supra*. The report of that case in 45 Law Ed. sets out, with great fullness, the briefs of the respective parties to that case. In that report (181 U. S., 45th Law Ed., l. c. 883) the following propositions of law were briefed:

> First—"It is within the domain of legislative discretion to provide by a general law a definite rule of apportioning the benefits to accrue from paving a street to lots in a defined benefit district."
>
> Second—"When the benefits to accrue from a local improvement are to be apportioned according to a fixed rule determined in advance by a legislative act, the property owner is not entitled to notice or hearing at the time that the assessment is made or in respect to the amount of the assessment."

The special tax bills in that case were issued under a charter substantially the same as the charter of the City of St. Louis so far as the method of establishing the improvement district by a fixed rule was concerned. This Court in that case held the tax bills issued without notice and which were apportioned according to a fixed rule determined in advance, and, therefore, similar to the tax bills involved in this case, to be constitutional, legal and binding, so that it is very apparent that this Court had the identical point before it in that case which is now brought before it by the plaintiff in error in this case when he attacks the legality of the charter provisions of the City of St. Louis wherein a definite rule of apportioning the benefits to accrue from paving a street to lots in a defined benefit district is established. In that case, with this same point made against the legality of tax bills issued under substantially the

same charter provisions, this Court held such bills legal.

Hence, it clearly appears that the City of St. Louis, under its charter and by the charter, had power to fix boundaries of any proposed improvement district, had power to determine what property in the improvement district was benefited and the amount of the benefits to be assessed and the proper adjustment of the taxes among the owners of the property embraced in the improvement district and under its said charter the city had power to cause an ordinance to be passed by its City Council carrying out the charter provisions in relation to the creating of the improvement district and the assessment of the benefits derived therefrom, and that when the city was acting in accordance with its charter powers, no notice or hearing was required in order to constitute due process of law within the meaning of the Constitution.

POINT III.

The constitutionality and legality of tax bills issued pursuant to the provisions of Section 14 *of Article VI of the Charter of the City of St. Louis have been sustained both by the Supreme Court of the State of Missouri and by this Court.*

In the case of Meier v. St. Louis, 180 Mo., l. c. 409, the Supreme Court of Missouri passed directly upon the charter provisions involved in this case, and held that the special tax bills issued under said Section 14 of Article VI of the Charter of St. Louis pursuant to ordinance passed in accordance with the provisions thereof was legal and valid. The Court will note in this connection that the only question of fact which is

open for consideration where a street improvement district is proposed to be created under Section 14 of Article VI of the Charter of St. Louis is the question of whether any designated street, avenue, etc., is to be improved, in which case said Section 14 of the Charter requires that two weeks' public notice of the time, place and matter to be considered, said notice stating the kind of material and manner of construction proposed to be used for the wearing surface of such improvement and also the classification, specification and plan for such work, which specification and plan shall be approved by said Board and filed in its office. If, within fifteen days after such public meeting, the owners of the major part of the area of the land made taxable by said Section 14 of Article VI of the Charter for such improvement, shall file in the office of the Board of Public Improvements their written remonstrance against the proposed improvement or against the material or manner thereof, the Board shall consider such remonstrance and if the Board shall, by a two-thirds vote, at a regular meeting, approve of the improvement, material or manner remonstrated against, they shall cause an ordinance for the same to be prepared and report the same with the reasons for their action and the remonstrance to the Assembly. If such majority fail to remonstrate within fifteen days or shall petition the Board for the improvement, said Board may, by a majority vote, approve the same and shall cause an ordinance to be prepared and reported to the Assembly therefor. (See pages 6 and 7 of brief of plaintiff in error where the clause of Section 14 of Article VI of the Charter of the City of St. Louis relating to this matter is printed in full.)

The above mentioned matters are the only questions

of fact that are subject to consideration. All others are absolutely precluded by the legislative authority granted to the City of St. Louis under its constitutional charter. The charter provisions for the improvement of streets in the City of St. Louis are specific and definite as to what property is benefited and how the benefits shall be apportioned and, as we show, is a legislative determination of what property is benefited and how such benefit shall be apportioned and assessed.

Having in view said Section 14 of Article VI of the Charter of St. Louis and the provisions for notice, giving property owners an opportunity to be heard on the question of the *kind of material* and the *manner of construction proposed to be used for the wearing surface of such improvement as above set forth,* the Supreme Court of the State of Missouri, in Meier v. St. Louis, 180 Mo., l. c. 409, said:

> "As to the contention that the special assessments amount to a taking of plaintiff's property without due process of law, it may be said that no notice is required by the Constitution to be given property owners respecting those matters which the Legislature itself determines or delegates to municipal authorities. (Spencer v. Merchant, 125 U. S. 345; Williams v. Eggleston, 170 U. S. 304, and St. Louis v. Rankin, 96 Mo. 497.)
>
> Publication of notice to the property owners and opportunity to be heard before the tribunal upon which is devolved the duty of ascertaining facts and acting therein in the special assessment proceedings, satisfies the constitutional requirement and is due process of law as to those matters to be passed upon by such tribunal. We think Section 14 of Article VI of the Charter of St. Louis complies with this requirement.
>
> When the taxing district has been fixed by valid

legislation and when the apportionment of the cost of the improvement upon the property in the district has been so fixed, the owner of the property in the district cannot be heard to contend in the court that his property was not in fact benefited or to the amount assessed in accordance with such apportionment. (Pryor v. Construction Co., 170 Mo. 439.)

The charter of St. Louis adopted by a vote of its people in obedience to an express grant of the Constitution of the State has, with respect to municipal matters, including special assessments for local improvements, all the force and effect of an act of the Legislature. (City of St. Louis v. Fisher, 167 Mo. 654; Pryor v. Construction Co., 170 Mo. 439; St. Louis v. Gleason, 15 Mo. App. 25; *Ibid* v. *Ibid,* 93 Mo. 33; Kansas City v. Oil Co., 140 Mo. 468.)"

It is very apparent, therefore, that since the only question left open for consideration or hearing was the question *of the kind of material and the manner of construction proposed to be used for the wearing surface of the improvement,* and as an opportunity was given to be heard on this, no property owner could complain. The charter provisions of the City of St. Louis fixed and determined the improvement district, the property to be benefited and the apportionment of the assessment, frontage and area, to be levied upon each piece of property within the improvement district. This being the exercise of a legislative power directly derived under the Constitution of the State of Missouri, we have shown to be legal and valid. This being so, it would have been an idle thing to have given any notice for any hearing in connection with these matters, because there would have been no power vested in any body to make any change therein. They were ab-

solutely fixed by the charter provisions and were a legislative enactment.

The special tax bills, the legality of which was involved in the case of French v. Barber, 181 U. S. 324, were issued under a charter substantially the same as the charter of the City of St. Louis so far as the method of establishing the improvement district was concerned, and this Court in that case held the tax bills issued without notice, and which were apportioned according to a fixed rule determined in advance and, therefore, similar to the tax bills involved in this case, to be legal and constitutional and thereby gave its approval to our present contention. The special tax bills so issued under the charter provisions of the City of Kansas City were held to be legal and valid in the case of French v. Barber by the Supreme Court of the State of Missouri, and thereafter the case was taken, on writ of error, to this Court, where, after an elaborate and full discussion of the case, many excerpts from which will be found quoted in this brief under Point II, this Court affirmed the judgment of the Missouri Supreme Court and held that the special tax bills in question were legal and binding (181 U. S. 324). That decision by this Court is a leading case upon which rest many subsequent decisions of State courts sustaining the doctrine enunciated under this point of our brief. Had the point made by plaintiff in error had any foundation for its existence, this Court could not have found the special tax bills in the French case constitutional and legal. At the same term of this Court at which the French case, *supra*, was decided, this Court also passed upon the case of Schumate v. Heman, 181 U. S. 403. The Schumate case also came up, on writ of error, from the Supreme Court of Missouri, and is the same case

reported in 156 Mo. 534, under the name and title of Heman v. Allen. A reference to the opinion in the Missouri Supreme Court will show that the points involved were substantially the same as those involved in this proceeding, saving and excepting that in that case it was a question of a special tax bill issued for the construction of a sewer. The charter provisions of the City of St. Louis relating to the creation of a district for the construction of a sewer is substantially the same as the provisions in reference to creating an improvement district for streets. The Supreme Court of Missouri in the Schumate case, *supra,* held that the municipal authorities of the City of St. Louis, under its charter, were vested with the exclusive power of establishing the sewer district in question and their act in so doing, in the absence of fraud, was conclusive upon the Court where suit was brought upon the special tax bills issued for such improvement, and that the property owner in that case had raised the question of the constitutionality of the special tax bills issued without notice just as the question is being raised in this proceeding. The Missouri Supreme Court in the case of Heman v. Allen, 156 Mo., l. c. 551, said:

> "No notice was required to be given to the defendant of the passage of the ordinance or the assessment before issuing of the tax bill, and none was necessary."

When this case, on writ of error, came before this Court, the Court, speaking through Mr. Justice Shiras, as shown by its opinion in 181 U. S., l. c. 403, said:

> "The only question which is open to our consideration upon this record is the contention of the plaintiff in error that the provisions of the charter of the City of St. Louis, the ordinances of the M..

nicipal Assembly, the contract with the defendant in error made thereunder, and the assessment against the property of the plaintiff in error for the cost of the construction of said sewer were null, void and of no effect for the reason that they were repugnant to the Fourteenth Amendment to the Constitution of the United States as construed and applied in the case of Norwood v. Baker, 172 U. S. 269.

This contention has been considered and determined under a similar state of facts by this Court in the recent case of French v. Barber Asphalt Paving Co., in error to the Supreme Court of the State of Missouri (181 U. S. 324), and upon authority of that case, the judgment of the Supreme Court of Missouri is affirmed."

The Court will bear in mind that the contention in the Schumate case on the part of the holder of the tax bill was that no notice was required to be given or had been given to the property owner of the passage of the ordinance or of the assessment before the issuing of tax bills and no opportunity was required to be given to the property owner to be heard upon the question of benefit, property to be benefited or assessments to be made.

This contention was fully sustained by this Court.

Hence, it appears that both by the decisions of this Court and of the Supreme Court of the State of Missouri, the question involved under this point of the brief is absolutely settled and foreclosed in favor of the defendant in error herein.

In the case of Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, this Court had before it the identical section of the charter of the City of St. Louis and an ordinance passed under said char-

ter provision providing for the reconstruction of a portion of Broadway. In that case this Court held, in specific terms, that the said charter provisions of the City of St. Louis were not unconstitutional, but it did hold that the ordinance passed by the City Council for the purpose of carrying out the said charter provisions in that specific case was void, because of the gross inequalities in the assessments made pursuant to the terms and provisions of that particular ordinance. But in that decision this Court, speaking through Justice Holmes in the memorandum filed as a part of the opinion, after a motion for leave to file a petition for rehearing had been made, for the purpose of clearing any ambiguity, in that case, said:

> "Our decision is limited, of course, to the particular ordinance before the Court to the assessment of three-fourths determined in the mode described. * * * To those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law."

After reversal, the Gast case went back to the Supreme Court of the State, where, after a hearing, the Supreme Court of Missouri decreed that only the area assessment was void under the opinion of this Court, and that the frontage assessment was legal and binding. Thereafter, on writ of error, the Gast case came to this Court again, and was again passed upon by this Court (245 U. S. 288). In this opinion this Court, speaking through Mr. Justice Pitney, said:

> "The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the State courts, provided they were not inconsistent with the opinion of this Court. It left

the tribunals of the State at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the land owners under the Fourteenth Amendment as established by our decision. As our former opinion shows, the conflict with Federal rights was due solely to the mode in which that portion of the tax which was levied according to area was distributed, the subsequent judgment of the State Court sustaining the tax to the extent of the frontage assessment, was not inconsistent with it."

That opinion of this Court further laid down the doctrine that there was nothing in the first opinion in the Gast case which precluded the State authorities from imposing a new area assessment so long as it did not conflict with the land owners' rights. It clearly appears that this Court in both the Gast cases recognizes the constitutionality of the charter provisions of the City of St. Louis involved in that case and the constitutionality of the ordinance passed by the City Council of the City of St. Louis for the purpose of carrying out the charter provisions, provided that in carrying out these provisions, assessment for benefits was not made in an unfair and inequitable manner. And the Court will note that the charter provisions in the case at bar are identical with the charter provisions under consideration in the two Gast cases *supra*. So that it clearly appears we have four decisions of this Court directly passing upon the constitutionality of the charter provisions and the ordinance involved in the case at bar, each one of which affirms and decides that such charter provisions and the ordinance to carry the same out are constitutional and legal, saving and excepting only in the first Gast case the assessment of

benefit as to area was so grossly unfair and inequitable that it shocked the conscience of the Court, for which reason, and for which reason alone, the area assessment only was in that instance declared null and void, leaving the front foot assessment standing in full force.

POINT IV.

This Court and the Missouri Supreme Court have both held that where tax bills were issued for street improvements under the authority of Article VI of Section 14 of the Charter of the City of St. Louis, the one-fourth levied and assessed under the front foot rule is valid and incontestable even where the three-fourths of such tax bills assessed under the area rule was invalid, because of gross inequalities in the assessment thereof.

In the case of Ruecking Const. Co. v. Withnell, 269 Mo. 546, this proposition has been decided affirmatively by the Supreme Court of the State of Missouri in the case at bar and a reference to that decision will show that this decision was made in the case where the validity of the tax bills on which this suit was founded, was directly involved.

In the case of Schneider Granite Co. v. Gast Realty & Investment Co., 269 Mo. 561, this proposition was decided in the affirmative by the Missouri Supreme Court in a case in which the tax bills sued on were tax bills which were issued under the authority of Article VI of Section 14 of the Charter of the City of St. Louis. And while under the authority and decision of this Court in the two Gast cases *supra,* the Missouri Supreme Court held that because of gross inequalities in the area assessment, the tax bills were invalid so far as

the assessments made under the area rule was concerned, nevertheless the tax bills so far as the assessment was made under the one-fourth front foot rule were held absolutely incontestable.

In the two Gast cases decided by this Court, one being reported in 240 U. S. 55, and the other in 245 U. S. 288, this Court held that the tax bills issued under the authority of Article VI, Section 14, of the Charter of the City of St. Louis, so far as the one-fourth of the assessment was based upon the front foot rule, were constitutional, valid and absolutely incontestable, even though in those two cases, because of gross inequalities in the assessment, the tax bills so far as they applied to the three-fourths assessed under the area rule were invalid. But these cases all establish the proposition beyond controversy that tax bills issued under the authority of Article VI of Section 14 of the charter for street improvements, even though no notice is given or any opportunity given to be heard, are constitutional and valid, saving and excepting only that if the three-fourths of such tax bills assessed under the area rule are of such gross inequality as to be inequitable, then, because of that reason, and that reaosn alone, the assessment so far as the area rule is concerned may be invalid.

POINT V.

In levying assessments for special improvements there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The fact that there may be inequalities is not sufficient to invalidate the tax bills.

In Houck v. Little River Drainage Dist., 239 U. S., l. c. 265, this Court said:

"When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State, in its discretion, may lay such assessments in proportion to position, frontage, area, market value or to benefits estimated by commissioners. (Davidson v. New Orleans, 96 U. S. 97, 106; Walston v. Nevin, 128 U. S. 578, 582; Spencer v. Merchant, 125 U. S. 345, 353, 356; French v. Barber Asphalt Paving Co., 181 U. S. 224, 343.)"

In the case of Wagner v. Leser, 239 U. S., l. c. 216, this Court said:

"This Court has frequently affirmed that the general taxing systems of the State are not to be presumed lacking in due process of law, because of inequalities or objections, so long as arbitrary action is avoided."

In St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S., l. c. 430, the Court said:

"But the mere fact that there may be inequalities is not enough to invalidate State action. (Davidson v. New Orleans, 96 U. S. 97, 105; Walston v. Nevin, 128 U. S. 578, 582; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 176, 177; Houck v. Little River Drainage Dist., 239 U. S. 478, 485.)"

And in the case of Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S., l. c. 58, this Court said:

"The Legislature may create taxing districts 'o meet the expense of local improvements, and may fix the basis of taxation without encountering the

Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. (Houck v. Little River Drainage Dist., 239 U. S. 254, 262.) The front foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely the cost will exceed the benefit and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. (French v. Barber Asphalt Paving Co., 181 U. S. 324; Cass Farm Co. v. Detroit, 181 U. S. 396, 397.)"

In the case of Louisville & Nashville R. R. v. Barber Asphalt Paving Co., 197 U. S., l. c. page 433, where the contention was made that because the property to be benefited was railroad property and therefore could not get any special benefit from the improvements, this Court said:

"But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular lands, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspect at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district—the municipality, and to disguise rather than to answer the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the constitution. * * * It is important for this Court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted. * * * It now is established beyond permissible controversy that laws like the

one before us are not contrary to the Constitution of the United States." (Citing a number of cases.)

Further on in the same opinion this Court said (page 434):

> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area and a particular area might recieve no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of huthings. And this has been the implication of the cases. (Davidson v. New Orleans, 96 U. S. 97-106; Detroit v. Parker, 181 U. S. 399, and a number of other cases.)"

Now, applying these decisions to the facts in this case, it clearly seems to us that the practical rule in such case is that a special assessment comes only within the provisions of the prohibition of the Fourteenth Amendment when the facts show beyond controversy that there is a gross inequality in levying the assessment and that the unfairness of the assessment would shock the conscience of the Court. The decisions of this Court from which the foregoing excerpts are quoted certainly establish the doctrine that had the improvement of Broadway in the Gast case *supra* been based upon the front foot rule, then, in that event, Gast

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could not have complained, but neither could the property owner adjoining him on the south whose lot only extended 100 feet have complained, because this Court says in the decisions just cited and quoted that a municipality has a right to adopt the front foot rule absoluely, and there can be no objection even though in that way the man who has only a very shallow lot (in that case a lot of 100 feet depth) would have had to pay just as much per front foot as Gast whose adjoining land extended to a depth of about 1,000 feet.

The cases just cited from this Court also laid down the proposition that mathematical certainty in the levying of assessments is not required; that a tax bill will not be overturned because of minor discrepancies; that all that is required in the levying of special assessments, so far as the Fourteenth Amendment is concerned, is the exercise of such care and judgment as can be expected from human intelligence applied to a complex problem.

Now let us see how the declarations of law so laid down by this Court in regard to what are and what are not inequalities sufficient to overturn an assesment are to be applied in the case at bar.

Certainly there could be no more complex question to be decided than the laying out of a street improvement district with Broadway meandering as it does through the taxing district involved in this proceeding.

As the Court will find it much more convenient in referring to the map of this taxing district and applying our argument by having a map of the district before it, we are inserting in this brief a plat of the taxing district involved in this proceeding. This plat is an exact copy of the one which was filed with the brief of the plaintiff in error.

As the plat does not show the points of the compass, for the convenience of the Court, we beg to say Osage Street is the north end of the taxing district and Neosho Street is the south end of the taxing district; that plaintiff's in error lots in blocks 2608 and 2609 are on the east side of Broadway and his lots in city blocks 2620 and 2621 are west of Broadway.

A reference to the plat will show that Broadway runs through the center of the taxing district in a double curve and along its entire passage it is intersected by streets running substantially at right angles to themselves, but at acute angles, in most cases, to Broadway. This creates a situation extremely difficult to meet under any circumstances. By reference to Section 14, Article VI, of the Charter of the City of St. Louis (see pages 5 and 6 of brief of plaintiff in error) it will be noted that in laying out an improvement district under such charter, the boundaries of such improvement district are fixed by drawing a line midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line so drawn shall be the boundary of the district, except that if the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. If there be no parallel or converging street on either side of the street to be improved, the district line shall be drawn 300 feet from and parallel to the street to be improved. But if there be a parallel or converging street on only one side of the street to be improved, then the district line on the other side shall be drawn parallel to the street to be improved at an average distance of the op-

posite district line so fixed and located. (See pages 5 and 6 of brief of plaintiff in error.)

The provision that if the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of such lots in the district to be improved seems eminently a fair provision, because confessedly a lot fronting on a street is necessarily benefited to its entire depth by the improvement of the street on which it fronts. When we come to the triangular lots, another peculiar condition exists. Such lots are necessarily subject to assessment for benefits conferred by the improvement of each of the streets upon which it fronts, and since it is not just that the entire lot should be assessed for the improvements of both of these streets, the assessment district is made to include only one-half of such lot for one street and one-half for the other. Certainly such a subdivision and such an arrangement comes clearly within the discretion allowed a legislative body, seeking to carry out a great public improvement which is not only for the benefit of the property owners, but for the benefit of the city at large.

One other situation meets us in this assessment district to which we desire to call the Court's attention. The Court will note that under the charter provisions, if a block fronting on the street to be improved is not subdivided and is not bounded by a street parallel or converging to the street to be improved, that then in that case the district line for such property shall be drawn parallel to the street to be improved and at an average distance of the opposite district line so fixed and located. This condition exists in blocks 2715 and 2716 as will be seen by reference to the map. The result is that in these two blocks the district line is

drawn parallel to Broadway and distant therefrom 172.54 feet, being the average distance of the opposite district line from Broadway; that is to say, the average distance of the improvement district lines on the west side of Broadway is found to be 172.54 feet and this, according to the charter provisions, is made the district improvement line for lots 2715 and 2716. (See testimony of Leo Osthaus, witness for plaintiff in error, as set forth on page 45 of Transcript of Record.) If the Court will read the testimony of witness Osthaus as shown on page 45 of the Transcript of Record, it will get a very clear and distinct idea of how the district was laid out in its entirety and why it was laid out in the manner shown on the map filed herewith.

In the opinion of the Supreme Court of Missouri sitting *en banc*, when passing on this case, after discussing fully the facts which we are now considering and after giving full consideration to the present contention of the plaintiff in error as to the inequalities claimed by him, that Court said:

> "Furthermore, the plat of the district shows that the property east and west of Broadway in the matter of material subdivision of same for the purposes of this assessment is treated with the utmost fairness and as much equality as the character of the same will permit. Wherever any discrepancy occurs, and it is but seldom, it is due to the irregularity or curving of Broadway and no other subdivision could have been made promotive of greater uniformity in the placing of the burdens upon the property in the district." (269 Mo., l. c. 554-555.)

Conceding that the district lines were not equi-distant from Broadway at every point, this fact was necessarily due to the irregular course of Broadway and

the formation of the city blocks within the district. Such inequality as there was, was unavoidable. The tax bills made out a *prima facie* case for the plaintiff, and the only proof offered by the defendant consisted of the testimony of the Deputy Assessor (see page 45 of Transcript of Record), who explained that where it was physically possible to do so, the average distance on either side of Broadway was maintained. He testified that at some points there were slight deviations, but they resulted from the line of Broadway and the triangular shape of certain city blocks. These inequalities, we submit, do not present a case of arbitrary or flagrant abuse; and as appears from the adjudications, it is not every inequality which justifies the Court in holding invalid tax bills for improvements which have benefited property.

The right to distribute the cost by the front foot rule is not questioned, and yet some lots may be many times the depth of others. Still all pay according to the number of front feet. Had the assessment in question been made on that basis, a simple calculation will show that the appellant here would have been no better off than under the method adopted of combining the front foot and the area basis of apportionment, as a matter of fact he would not have been nearly so well off, as we will show later. In the Gast case it appears from the facts that the Gast Company, by reason of the extreme depth of its property included in the area district (the property being unplatted), was compelled to pay one-third of the entire cost of improving a considerable length of North Broadway; a much greater amount than the Supreme Court believed upon the facts could possibly have been conferred in benefits. Gast was assessed on an area basis upon a depth of nearly 500 feet,

while the adjoining property owner was assessed on an area based upon a depth of only 100 feet.

Every lot of the twelve lots of appellant here involved has its front on Broadway, and ten of the lots on east side are only 120 feet in depth; whereas the average depth of the benefit district on west side is 172.54 feet (see Transcript of Record, page 45), and therefore, the average depth to which other property in the district on west side was assessed is 172.54 feet. The other two lots of plaintiff in error on west side are of irregular shape, one a triangle and the other almost a triangle, both having a front on the improved street, and though one of them is assessed at one end at a depth of more than 172.54 feet, it tapers to a point at the other end; and therefore, the average depth on which it is assessed is less than the average at which all other property in the benefit district on the west side was asesssed. And while it is true that owing to the peculiar formation of the city blocks and the irregular course of Broadway, the boundary lines of the district are not at each and every point exactly equidistant from Broadway, they are as nearly so as conditions will permit, and the inequalities caused by the circumstances are not gross, but slight.

We think we can put the matter under discussion before this Court in a way to illuminate the true situation and give the Court an opportunity to see at a glance whether or not there has been such gross inequality in the assessment against the plaintiff in error as justifies his complaint. There is a very true and homely expression to the effect that "the proof of the pudding is the eating thereof." The plat and the three tax bills in evidence enable anyone to easily compute what the cost is to each lot embraced in the district and

see what the cost would have been had the assessments been made entirely upon the front foot rule, which this Court has said would be absolutely incontestable, had such a method been resorted to. The Court will find inserted between pages 2 and 3 of the Transcript of the Record copies of defendant's in error exhibits "A," "K" and "L." "A" is a copy of the tax bill issued against one of the 10 lots owned by the plaintiff in error in city blocks 2608 and 2609; each of the other 9 lots were of exactly the same dimensions, and against each of the other 9 lots the same assessment was levied. (See Transcript of Record, p. 2.) Exhibits "K" and "L" were against the irregular lots which plaintiff in error owned in blocks 2620 and 2621. From these tax bills it appears that the total cost of improving Broadway for the district represented by the plat filed herewith was $70,904.78. The total frontage of the property owned by plaintiff in error on Broadway was 948.36 feet. The total frontage of all the property in district was 7,464.17 feet. The total amount assessed against the property of plaintiff in error under the front foot rule and the area rule combined, according to the charter provisions, was $7,719.23. Plaintiff in error owned 948.36 front feet on Broadway, his total assessment under the area and the front foot combined amounted to $7,719.23, which, reduced to a front foot basis, is a charge of $8.13 per front foot. The entire cost of the improvement of the district was $70,904.78. Had the total cost been apportioned to the total frontage according to the front foot rule, which would be obtained by dividing the total cost of district, $70,904.78, by 7,464.17, total frontage, the cost per front foot on Broadway to all the property owners in the district would have been $9.50 per front foot, which would be $1.37 per front foot more than the

front foot cost to the plaintiff in error under the method of assessment adopted under the charter, and being a total cost of $9,018.48 as against the total amount assessed against him of $7,719.23. In other words, had the entire assessment been made upon the front foot rule, which this Court has said repeatedly was a fair and just method of assessment, plaintiff in error would have been called upon to pay $9.50 per front foot or a total of $1,299.25 more than he has been assessed under the combined front foot and area rule in effect under the city charter.

In the memorandum opinion filed in the Gast case *supra,* Mr. Justice Holmes said:

> "Our decision is limited, of course, to the particular ordinance before the Court, to the assessment of three-fourths determined in the mode described and to those who, like the plaintiff in error, have suffered from inequalities that have no justification in law."
>
> 240 U. S., l. c. 60.

It is only the man who has suffered gross inequalities who has a right to complain. If, under the rulings of this Court, the entire assessment had been made upon the front foot basis, certainly plaintiff in error could not have complained of the assessment of $7,719.23, because he had not suffered any inequalities whatsoever. On the contrary, he had received a decided benefit, as his total assessment under the combined front foot and area rule established by the charter of the city was $1,299.25 less than it would have been under an exclusively front foot assessment. Plaintiff in error has had the benefit of a great improvement which necessarily has greatly enhanced the value of his property. He has been assessed for it pro-

portionately much less than his neighbors. He has been assessed decidedly less than the average cost to every other property owner in the district, and now he seeks to set aside the assessment against his property, claiming gross inequalities. The gross inequalities, if any there be, are not against the plaintiff in error, but in his favor, and he certainly has no just ground of complaint.

We, therefore, respectfully submit that under the authorities and under the facts, the judgment should be affirmed.

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